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No. 99-____

IN THE

Supreme Court of the United States

LOCKHEED MISSILES AND SPACE COMPANY, INC.

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. MARGARET A. NEWSHAM AND MARTIN OVERBEEK BLOEM,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 21, 1999

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit violated the principles against the retroactive application of new legislation in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act.

2. Whether the Ninth Circuit erred in ruling that allegations in a False Claims Act action that are based on Government audit reports and/or information obtained through discovery were not publicly disclosed.

3. Whether the Ninth Circuit erred in determining that relators – one of whom was fired prior to 1986 and one of whom never reported his allegations to the Government before filing suit – are the original sources of post-1986 allegations set forth in a False Claims Act complaint.

4. Whether the Ninth Circuit erred in applying a State's procedural rules to a motion to dismiss state-law counterclaims brought in a federal False Claims Act action.

PARTIES TO THE PROCEEDING

Petitioner Lockheed Missiles and Space Company, Inc., was appellee/cross-appellant below.

Respondents Margaret A. Newsham and Martin Overbeek Bloem were appellants/cross-appellees below. Respondents filed this action in the district court in the name of the United States. The United States, which elected not to intervene in this action pursuant to 31 U.S.C. § 3730(b)(2), did not participate in this case in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Lockheed Missiles and Space Company, Inc. notes that its successor, Lockheed Martin Missiles and Space, is an operating division of Lockheed Martin Corporation. Lockheed Martin Corporation has no parent corporations and no publicly held company owns 10% or more of its stock.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Lockheed Missiles and Space Company, Inc. respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 190 F.3d 963 (1999) and is reprinted in the Appendix ("App.") at 1a-21a. The unpublished order of the court of appeals denying the petitions for rehearing and the petition for rehearing *en banc* is reprinted at App. 22a-23a.

The district court's unpublished order granting respondents' motion to dismiss Lockheed's counterclaims and denying motion to strike and for attorney's fees is reprinted at App. 24a-27a. The district court's unpublished order granting Lockheed's motion for

reconsideration and dismissing this case is reprinted at App. 28a-37a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 24, 1999. The amended judgment of the Court of Appeals for the Ninth Circuit was entered on September 10, 1999. Lockheed's timely petition for rehearing and petition for rehearing *en banc* were both denied on September 22, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The applicable provision of the civil False Claims Act, 31 U.S.C. § 3730, was amended in 1986. The pre-amendment version of § 3730 provides in pertinent part:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. § 3730(b)(4) (1982).

The amended version of § 3730 provides in pertinent part:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless the action is brought by the Attorney General or the person bringing the action is the original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information

> to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (1986).

California's anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, is reprinted in its entirety in Appendix E (App. at 38a-40a) to this Petition.

STATEMENT OF THE CASE

As the tortured history of this case shows, an issue present since the inception of this case is whether respondents may maintain an action based on information known to the Government before 1986 and before the action was filed. The district court and the Ninth Circuit ultimately agreed that allegations regarding alleged false claims submitted to the Government prior to October 27, 1986 had to be dismissed. App. at 11a-12a. They disagreed, however, as to whether allegations regarding alleged false claims which were based on a continuation of the same charging practices known to the Government prior to 1986, but which were not submitted to the Government until after October 26, 1986, also had to be dismissed. App. at 15a.[1/]

A. Newsham's Report to the Government

In 1984, respondent Margaret Newsham, a former Lockheed employee, contacted the Defense Contract Audit Agency ("DCAA") and accused Lockheed of, among other things, mischarging labor hours of idle and non-productive employees to Government contracts and mischarging labor hours between contracts. App. at 29a; Respondents' Court of Appeals Excerpts of Record ("ER") 1 at ¶28. Thereafter, DCAA audited all of Newsham's allegations, except the alleged mischarging between two programs. 1989 Brief of United States as *Amicus Curiae*, Lockheed's Supplemental Excerpts of Record ("SER") 41 at 5.

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[1] The 1986 amendments to the False Claims Act were effective on October 27, 1986. App. 12a.

Based on DCAA auditors' observations of Lockheed employees at work, DCAA concluded that a proportion of time in excess of a norm represented nonproductive time in Lockheed's so-called "non-touch" labor force. ER 746, Ex. 21. Lockheed disagreed with the DCAA's methodology as well as its findings. ER 746, Ex. 21 at 7.

Government contracting officers reviewed the DCAA audit reports and discussed the findings with Lockheed. SER 41 at 5. The Government concluded "no claim against Lockheed was appropriate on any of the audit reports." *Id.*

B. The Complaint

On January 8, 1988, respondents Margaret Newsham and Martin Overbeek Bloem filed this action under seal under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. The Complaint was unsealed and served on Lockheed on July 5, 1988. App. at 9a. In February 1989, the Government, after conducting a yearlong investigation of the allegations, declined to intervene in the case, leaving its prosecution solely to respondents as a private action on behalf of the United States. App. at 9a.

The allegations in the Complaint were substantially the same as the allegations disclosed by Newsham to the Government in 1984. *See* Complaint, ER 1, at ¶ 28. Specifically, Newsham and Bloem alleged that the time of Lockheed's employees who were idle or insufficiently busy was mischarged to cost-reimbursable Government contracts. *See* Complaint, ER 1, at ¶¶ 14 to 27; App. at 8a.

Although the Complaint states that this mischarging "has continued to the present and is still occurring now" (ER 1 at ¶ 32), respondents later acknowledged that "the fraudulent activities alleged by Newsham occurred prior to 1986." Relators' Opposition to Lockheed's 1988 Motion to Dismiss, SER 24 at 4. *See also*, Complaint, ER 1, at ¶¶ 12 to 23.

Many of the contracts that were the subject of discovery in this case had been awarded to Lockheed before October 27, 1986 and continued to be performed after October 27, 1986. Thus, the

nature of the alleged false claims submitted to the Government by Lockheed on October 26, 1986 was identical to the alleged false claims submitted on or after October 27, 1986, i.e. they were for labor costs for employees, including those employees who were awaiting security clearances, who were alleged to have been insufficiently busy. As such, long before the Complaint was filed, the Government knew not only of the evidence or information that underlaid Newsham and Bloem's allegations that false claims were submitted prior to October 27, 1986 (as the Ninth Circuit correctly found), but also of precisely the same information regarding respondents' allegations that false claims were submitted after October 26, 1986.

C. The District Court Proceedings

On August 26, 1988, Lockheed brought its first motion to dismiss Newsham's FCA allegations for lack of subject matter jurisdiction. District Court Clerk's Record ("CR") 17. Lockheed argued that the pre-1986 FCA barred this *qui tam* action because it is "based on evidence or information the Government had [both prior to 1986 and] when the action was brought." 31 U.S.C. § 3730(b)(4) (1982).[2/] The sole issue presented to the court was whether the 1986 amendment that eliminated the Government-knowledge defense should be applied to this case where it was conceded that, under the pre-1986 FCA, the action would be barred.

On March 29, 1989, the district court found that "*[t]he parties agree* that under the pre-1986 [FCA], the portions of the *qui tam* complaint based on plaintiff Newsham's allegations would have to be dismissed." Order Denying Motion to Dismiss,

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[2] Lockheed's contention that Newsham's allegations would have to be dismissed if the pre-1986 FCA were applied was not contested by respondents. Nor was it contested by the Department of Justice, which stated in its *amicus curiae* brief: "[T]here is no question that if this action were governed by the law in existence in 1984 [when Newsham disclosed her allegations to the DCAA], this Court would have no jurisdiction over Mrs. Newsham's complaint, and it would have to be dismissed." SER 41 at 8.

ER 45, at 4 (emphasis added). However, the court denied Lockheed's motion because it found that, pursuant to *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974), the 1986 amendment to the FCA's Government-knowledge defense was to be applied retroactively. ER 45 at 11-12.

On June 17, 1991, following briefing and argument on motions attacking the constitutionality of the *qui tam* provisions, Lockheed filed an answer denying respondents' FCA allegations and asserted state-law counterclaims against Newsham and Bloem. App. at 9a.

In 1994, this Court revisited the retroactivity issue and, limiting *Bradley*, held that prospectivity remains the appropriate default rule. *Landgraf v. USI Film Products*, 511 U.S. 244, 272 (1994). Based on *Landgraf*, Lockheed filed a motion for reconsideration of the court's 1989 order denying Lockheed's motion to dismiss (CR 427) and filed a second motion seeking only prospective application of various other provisions of the 1986 FCA amendments. CR 431. On April 20, 1995, the district court granted in part and denied in part Lockheed's motions. CR 509.

On May 19, 1995, Lockheed filed a motion for reconsideration of three of the district court's rulings, including its determination that the 1986 amendment to the Government-knowledge bar (31 U.S.C. § 3730(e)(4)(A) (1986)) should be applied retroactively, thereby giving the court subject-matter jurisdiction over Newsham's allegations. CR 513. Alternatively, Lockheed sought certification of two of the district court's rulings. CR 513. On August 2, 1995, the court denied that motion. CR 562.[3/]

On that same date, the district court granted Newsham and Bloem's motion to dismiss Lockheed's counterclaims pursuant to

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[3] On November 8, 1995, the court issued an amended order, reiterating its ruling that 31 U.S.C. § 3730(e)(4)(A) applies retroactively to this case and that the court therefore has jurisdiction over Newsham's claims. ER 579 at 14.

the Federal Rules of Civil Procedure and denied their motion to strike Lockheed's counterclaims and for attorneys' fees based on California's Anti-SLAPP statute. App. at 24a-27a.

On June 16, 1997, this Court unanimously held that 31 U.S.C. § 3730(e)(4)(A) does not apply retroactively. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). Based on *Schumer*, on June 30, 1997, Lockheed filed another motion for reconsideration, requesting that Newsham's allegations, including those made jointly with Bloem, be dismissed pursuant to the pre-1986 FCA. CR 738 and CR 739 ("1997 Motion for Reconsideration").

After the briefs were filed, and just one week prior to the hearing on Lockheed's 1997 Motion for Reconsideration, Newsham and Bloem filed a motion seeking leave to file an amended complaint. ER 752, *Qui Tam* Plaintiffs' Memorandum in Support of Motion for Leave to File First Amended Complaint.

On July 31, 1997, the district court found that this action is based on information the Government possessed when the action was filed and, therefore, dismissed the entire action with prejudice against respondents.[4/] App. at 35a-36a. In response to an *amicus curiae* brief submitted by the Government, the action was dismissed without prejudice as to the United States. App. at 37a.[5/]

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[4] Because two of the four allegations attributed solely to Bloem (Complaint, ER 1, at ¶¶ 26 and 27) previously had been dismissed pursuant to stipulation, the only allegations attributed solely to Bloem that were at issue on appeal are the allegations at ¶¶ 24 and 25 of the Complaint. In this regard, the district court correctly found that Bloem's allegations at ¶¶ 24 and 25 of the Complaint are "sufficiently similar to the remaining allegations contained in the complaint and alleged by Newsham so as to be indistinguishable from the information conveyed . . . to the government regarding claims of misbilling by Lockheed." App. at 36a. Thus, the district court properly dismissed the entire action.

[5] Because the pre-1986 jurisdictional bar does not apply to actions pursued by the Government (31 U.S.C. § 3730(b)(4)), the Government could have prevented the dismissal by intervening in this action. The Government did not do so. It did, however, submit an *amicus curiae* brief requesting that, if the

(Footnote cont'd on next page)

Additionally, the district court denied Newsham and Bloem's motion to file an amended complaint, finding that the amendment would be "futile." App. at 36a.

Having now prevailed, Lockheed sought costs. The district court denied Lockheed's cost bill, finding that an award of costs would result in a severe hardship to respondents and that imposing costs in an action not decided on the merits would have a chilling effect on future *qui tam* actions. ER 768 at 3. Newsham and Bloem appealed on the jurisdictional issue and Lockheed appealed on the cost issue.

D. The Ninth Circuit Proceedings

The Ninth Circuit affirmed in part and reversed in part. App. at 1a-21a. The court affirmed the district court's ruling that "the pre-1986 claims" (i.e., the allegations regarding requests for payment submitted to the Government prior to October 27, 1986) were barred by the pre-1986 version of the FCA because the Government possessed information about those allegations before the action was brought. App. at 11a-12a. Based on a prior Ninth Circuit decision,[6] however, the court held that the 1986 version of the FCA applied to "the post-1986 claims" (i.e., the allegations regarding requests for payment submitted to the Government after

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(Footnote cont'd from previous page.)

action were dismissed, it be dismissed without prejudice as to the United States. The Government explained its position as follows:

> While the United States has no current intention to pursue this matter in the event that it is dismissed, there are many other cases in which the United States does desire to pursue the action notwithstanding a jurisdictional defect in the relator's complaint, and we are concerned that any dismissal with prejudice as to the United States here would adversely affect our ability to do so.

CR 747, Memorandum of United States as *Amicus Curiae*, at 2.

[6] *United States ex rel. Lujan v. Hughes Aircraft Company*, 162 F.3d 1027 (9th Cir. 1998).

October 26, 1986). App. at 11a-12a.[7] Though the public disclosure and original source issues had not been briefed, the court then proceeded to interpret the amended jurisdictional bar and reversed the dismissal of the post-1986 claims. App. at 14a-15a. It held that the post-1986 claims had not been publicly disclosed prior to the unsealing of the original complaint and that, even if they were, respondents Newsham and Bloem are the original sources of those allegations. App. at 14a-15a. After finding that respondents could maintain an FCA action based on post-1986 claims, the court held that the district court erred in denying respondents' motion to amend their complaint. App. at 15a.[8] Then, the court held that the district court erred in not applying California's Anti-SLAPP statute to Lockheed's counterclaims. App. at 20a. Finally, because the court determined that the district court had jurisdiction over respondents' post-1986 claims, the court concluded that the issue of costs was premature and dismissed Lockheed's cost-appeal as moot. App. at 21a.

Lockheed filed a petition for rehearing and petition for rehearing *en banc* on the grounds that (1) the panel's retroactivity decision conflicts with the decision of a prior panel of the Ninth Circuit that was not addressed in that decision; and (2) the panel's

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[7] Although "claims" can be used to refer to (1) allegations, (2) requests for payment, or (3) causes of action, we have, for purposes of this Petition, used the terms "pre-1986 claims" and "post-1986 claims" in the same manner as used by the Ninth Circuit.

[8] Newsham and Bloem cannot amend their complaint to confer jurisdiction on the district court because subject-matter jurisdiction must first exist when the original complaint is filed. *See Newman-Green*, 490 U.S. at 831-32 (28 U.S.C. § 1653 permits amendments to cure defective allegations of jurisdiction, not to create jurisdiction that did not exist); *Morongo Band of Mission Indians v. Calif. State Board of Equalization*, 858 F.2d 1376, 1380-81 (9th Cir. 1988) ("[T]he district court is powerless to grant leave to amend when it lacks jurisdiction over the original complaint"), *cert. denied*, *Miller v. Morongo Band of Mission Indians*, 488 U.S. 1006 (1999). Consequently, the amended complaint is irrelevant if, as Lockheed contends, the court did not have jurisdiction over the original complaint.

finding that respondents are the original sources of the post-1986 claims was premature and erroneous. The Ninth Circuit summarily denied that petition. App. at 23a.

REASONS FOR GRANTING THE PETITION

The questions presented arise from the 1986 amendments to the FCA, which expanded the class of relators empowered to bring a *qui tam* action. The FCA was amended in 1986 "to permit *qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information." *Schumer*, 520 U.S. at 946 (*citing* 31 U.S.C. § 3730(e)(4)(A)). Congress hoped to achieve "the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute on their own." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

The 1986 FCA sparked an explosion of *qui tam* lawsuits.[9/] Recognizing the balance that Congress sought to achieve, courts have nonetheless struggled to interpret the 1986 FCA's jurisdictional limitations. As a result, there has emerged judicial conflict on the question of who may properly bring a *qui tam* action.

This Court sought to resolve this conflict when it granted the petition for *certiorari* in *Schumer*, which, like the present case, involved the questions of whether (1) the 1986 FCA jurisdictional provision may be applied retroactively; and (2) the Government's release of its audit reports to employees of the audited contractor constitutes a public disclosure under the 1986 FCA. 520 U.S. at 945. Because this Court held that the *Schumer* action should have been dismissed under the 1982 FCA, the Court did not render any

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[9] Since the 1986 amendments, more than 2,400 *qui tam* suits have been filed. The number of *qui tam* suits filed has risen from 33 in fiscal year 1987 to 534 in fiscal year 1997. *See* 70 Fed. Cont. Rep. 403 (BNA Oct. 26, 1998).

opinion on the meaning of the 1986 FCA's public disclosure provision. *Id.* Similarly, because in *Schumer* both the disclosure to the Government and the submission of the alleged false claims occurred prior to the effective date of the 1986 amendments, this Court did not determine whether the 1986 FCA may be applied to a case involving a pre-1986 disclosure and an alleged post-1986 false claim. Thus, the retroactivity and public disclosure questions left unresolved in *Schumer* are present here, along with the additional questions of (1) who can be an original source under the 1986 FCA and (2) whether state procedural rules can be applied to counterclaims in an FCA case.

The Ninth Circuit's conclusion that the 1986 amendment to 31 U.S.C. § 3730 could be applied to revive a lawsuit that was barred as of 1984 under the pre-1986 version of the FCA cannot be reconciled with this Court's rule against the retroactive application of new legislation enunciated in *Landgraf* and *Schumer*. The Ninth Circuit's holding that the timing of the Government's knowledge about an alleged false claim is irrelevant for purposes of retroactivity (like the Third Circuit decision discussed below) is contrary to the holding of a different Ninth Circuit panel. Additionally, the Ninth Circuit's holding that information disclosed in audit reports and/or obtained through discovery was not publicly disclosed and that respondents are the original sources of that information conflicts with decisions of the Second, Third, Eighth and Tenth Circuits. Moreover, the Ninth Circuit's holding that California's anti-SLAPP statute should be applied to Lockheed's counterclaims conflicts with this Court's decisions, including *Hanna v. Plumer*, 380 U.S. 460 (1965), and decisions of the Third, Fifth and Sixth Circuits addressing the circumstances of when a state procedural rule may be applied in a federal-court proceeding. Thus, review should be granted to ensure adherence to this Court's precedents and to resolve the conflicts with respect to these important questions.

I. THE NINTH CIRCUIT'S RETROACTIVITY RULING IS INCONSISTENT WITH THIS COURT'S DECISIONS IN *LANDGRAF* AND *SCHUMER*.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court reaffirmed the general rule that statutes are not to be given

retroactive effect absent clear congressional intent to the contrary. This Court explained that a statute has "retroactive effect" if it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.

Subsequently, in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950-951 (1997), this Court held that the rule against the retroactive application of statutes is equally applicable to jurisdictional statutes, including the 1986 jurisdictional amendment to the FCA. This Court then concluded that the 1986 jurisdictional amendment, 31 U.S.C. § 3730(e)(4), could not be applied retroactively in a case involving alleged false claims that were submitted to, and knowledge that was obtained by, the Government prior to the effective date of the 1986 FCA because such application would deprive the defendant of a previously available defense. *Id.* at 950-952.

Similarly, application of the 1986 FCA to allegedly false claims submitted after 1986 that are merely a continuation of alleged improper charging practices known to the Government prior to 1986 alters the legal effect of the Government's pre-1986 knowledge and deprives defendant of a defense. Absent the 1986 amendments, this action would have been dismissed based on the Government's pre-1986 knowledge. Accordingly, application of the 1986 amendments deprives Lockheed of an absolute defense to this *qui tam* action. Applying the 1986 amendments to this case, therefore, results in the new legislation having a retroactive effect. Specifically, it attaches "'a new disability, in respect to transactions or considerations already past.'" *Schumer*, 520 U.S. at 948 (*quoting Landgraf*, 511 U.S. at 269).

Thus, the Ninth Circuit below impermissibly applied the 1986 FCA to revive claims that were barred by Government knowledge prior to enactment of the 1986 FCA. *See Landgraf*, 511 U.S. at 269-70 (statute not to be applied retroactively if it

"attaches new legal consequences to *events* completed before its enactment") (emphasis added).[10/]

II. THE COURTS OF APPEALS ARE DIVIDED IN THE INTERPRETATION AND APPLICATION OF THE 1986 AMENDMENTS TO THE FALSE CLAIMS ACT.

The 1986 FCA amendments have created judicial conflict and confusion. The courts of appeals are divided on a number of issues involving the interpretation and application of the FCA. This case involves three of those circuit splits, which are addressed below.

A. The Courts of Appeals Are Divided on What Constitutes the Relevant Event for Purposes of Retroactivity.

In *Schumer*, this Court expressly left unanswered the question of whether it is the submission of the allegedly false claim or the disclosure of information to the Government about the submission that "constitutes the relevant conduct for purposes

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[10] The fact that the Government's pre-1986 knowledge bars respondents' post-1986 claims as well as their pre-1986 claims is also supported by analogous appellate court decisions addressing the jurisdictional bar in the 1986 FCA. The Circuits have held that a public disclosure bars a subsequent *qui tam* action based on conduct alleged to have occurred *after* the public disclosure where the subsequent conduct is the same type of conduct as the conduct that was previously disclosed. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 691 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 865 (1997); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1475 (9th Cir. 1996), *cert. denied*, 519 U.S. 865, *reh'g denied*, 519 U.S. 1001 (1996); *United States ex rel. Fine v. Sandia Corporation*, 70 F.3d 568 (10th Cir. 1995). By analogy, under the pre-1986 FCA, Government knowledge bars a subsequent *qui tam* action based on conduct alleged to have occurred after the Government obtained its knowledge where the subsequent conduct is the same as that previously disclosed to the Government. To hold otherwise would effectively eliminate the jurisdictional bar by permitting private citizens to bring parasitic suits simply by alleging that the alleged fraudulent conduct, about which the Government (prior to 1986) or the public (after 1986) already knew, continued after the information was disclosed.

of [the] retroactivity analysis." 520 U.S. at 946 n.4. In answering that question, the courts of appeals are in clear conflict.

Following this Court's retroactivity analysis set forth in *Landgraf*, the first panel of the Ninth Circuit to address the issue held that, for purposes of addressing retroactivity of the 1986 amendment to § 3730, the key focus must be on the time when the Government obtained its knowledge, not on when the alleged false claims were submitted. *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 812-815 (9th Cir. 1995) ("*Anderson I*"), *cert. denied*, 516 U.S. 1043 (1996). After *Schumer*, that panel reaffirmed its holding. *United States ex rel. Anderson v. Northern Telecom, Inc.*, No. 96-36152, 1998 WL 141179, at *3 (9th Cir. March 27, 1998) (unpublished opinion) ("[T]he Supreme Court's decision in [*Schumer*] left undisturbed this court's holding in *Anderson I* that the relevant conduct for purposes of determining the applicability of the 1986 amendment is the disclosure of information to the government.")

Subsequently, in *United States ex rel. Lujan v. Hughes Aircraft Company*, 162 F.3d 1027 (9th Cir. 1998), a different panel of the Ninth Circuit held, without addressing *Anderson I*, that "the crucial event for purposes of non-retroactivity is the alleged presentation by [the defendant] of a false claim, and not the public [sic] disclosure of that conduct." 162 F.3d at 1031.[11/] Citing *Lujan*, the panel below applied the 1986 amendments to respondents' post-1986 claims even though those claims are based on a continuation of alleged improper charging practices known to the Government prior to 1986. App. at 11a-15a.[12/] The Ninth Circuit declined to acknowledge, much less resolve, the intra-

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[11] It appears that the court intended to refer to a disclosure to the Government (i.e., Government knowledge) in the sentence quoted above and not to "public disclosure," a term unique to the 1986 FCA.

[12] The *Lujan* panel ignored the rule that one panel "'is bound by the decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.'" *Catholic Social Services, Inc. v. Immigration and Naturalization Service*, 182 F.3d 1053, 1057-58 (9th Cir. 1999) (citation omitted).

circuit conflict between *Anderson I* and *Lujan* when it summarily denied Lockheed's petition for rehearing *en banc*.

The Third Circuit, in contrast, recently acknowledged the holding in *Anderson I*, but rejected it in concluding that it would use "the date the claim was submitted for determining the retroactivity of the [1986] Amendment's 'public disclosure' bar to *qui tam* suits." *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 411 (3rd Cir. 1999).

By refusing to follow *Anderson I*, the Ninth Circuit in *Lujan* and the Third Circuit in *Cantekin* not only created an intra-circuit and an inter-circuit split, but also reached an incorrect result. As acknowledged by this Court, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270. In *Martin v. Hadix*, 119 S. Ct. 1998, 2008 (1999) (Scalia, J., concurring), Justice Scalia stated: "As I explained in my concurrence in *Landgraf*, . . . I think the decision of which reference point (which 'retroactivity event') to select should turn on which activity the statute was intended to regulate." Here, the amendment to 31 U.S.C. § 3730 did not change the legal consequences of submitting false claims to the Government. Before and after the 1986 amendment, Lockheed would have been liable for submitting false claims. Instead, the amendment changed the circumstances under which a *qui tam* relator could pursue an FCA action based on the alleged submission of false claims. The amendment eliminated the Government-knowledge bar and, in its stead, created a new class of plaintiffs (in addition to the Government itself) who could pursue FCA actions that they previously could not have pursued. Thus, the "relevant past event" is the Government's knowledge obtained prior to 1986 of the evidence or information (31 U.S.C. § 3730(b)(4)) that is the basis for the alleged false claims. Therefore, the Ninth Circuit below erred in finding that the Government's knowledge is not a relevant event for purposes of retroactivity.

Moreover, applying the 1986 FCA to alleged false claims that are based merely on a continuation of alleged improper

charging practices, which allegations were known to the Government prior to 1986, changes the legal effect of the Government's pre-1986 knowledge and deprives defendants like Lockheed of a defense. For the reasons stated in section I above, such retroactive application of the FCA is improper.

B. The Courts of Appeals Are Divided on What Constitutes a Public Disclosure and Who Qualifies As an Original Source.

In applying the 1986 FCA to Newsham and Bloem's post-1986 claims, the Ninth Circuit erroneously held that these claims had not been publicly disclosed prior to the filing of the action, even though the court noted that those same allegations had been the subject of Government audit reports. App. at 12a-13a. The court further held that even if the allegations had been so disclosed, respondents qualify as "original sources" of the information. App. at 14a. The court reached this conclusion even though respondents admitted that they obtained some of their information about these allegations *from* the Government's audit reports. Declaration of Respondents' counsel, ER 746, at 10-15;[13/] Respondents' Ninth Circuit Opening Brief ("Respondents' Brief") at 19; App. at 13a, 15a. In that regard, the holding conflicts with the public disclosure/original source provision in 31 U.S.C. § 3730(e)(4) of the 1986 FCA that bars such "parasitic" actions. It is also squarely in conflict with several decisions rendered by other circuits.

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[13] Although the declaration of respondents' counsel is replete with improper argument, opinions, and hearsay, Lockheed's motion to strike certain paragraphs of the declaration was denied by the Ninth Circuit.

1. The Limited Factual Record Before the Ninth Circuit Indicated that Newsham and Bloem's Post-1986 Claims Are Based Upon Information Contained in Government Audit Reports.

The Ninth Circuit issued a confusing and conflicting analysis of the public disclosure and original source provisions of the 1986 FCA. With respect to the post-1986 claims, the appellate court stated that "[t]he relators asserted that they did not learn of the basis for some of these claims until they conducted discovery after the 1988 filing of the original complaint." App. at 13a. Later, the opinion states that "[t]he original complaint alleged improper billing both before and after the effective date of the 1986 amendments." *Id.* As noted above, the court also found that respondents' post-1986 claims were a continuation of their pre-1986 claims. *Id.* at 11a.

Whether the post-1986 claims were a continuation of the pre-1986 claims or were based on information obtained by respondents' counsel from discovery, they were publicly disclosed, contrary to the Ninth Circuit's conclusion. The post-1986 claims were based on information that was the subject of several DCAA audit reports, the findings of which were disclosed to Lockheed before the original complaint was filed. ER 746, Ex. 14 and Ex. 21. During discovery, the Government produced the audit reports to the respondents who admittedly relied upon the reports as the basis for their proposed first amended complaint. Respondents' Brief at 19; ER 746 at 10-15.

The Ninth Circuit steered itself toward its erroneous conclusions by addressing these issues without the benefit of findings rendered by the district court or briefing by either party concerning the application of the 1986 FCA's jurisdiction provision.[14/] Generally, to be reviewable upon appeal, a claim or

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[14] Lockheed had successfully moved the district court to dismiss the entire action under the 1982 FCA. Accordingly, the complete factual record on the questions underlying the public disclosure/original source provisions of the 1986 FCA had never been presented for the district court's consideration. Nor were

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issue must have been "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 40 (1992). This general principle is essential to ensure that parties are not surprised on appeal by the resolution of issues upon which they have had no opportunity to introduce evidence. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

In particular, determinations of *qui tam* jurisdiction under 31 U.S.C. § 3730(e)(4) "depend on factual findings that must be made by the district court in the first instance." *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 409 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994). *See also, United States and Mathews v. Bank of Farmington*, 166 F.3d 853, 861 n.6 (7th Cir. 1999) (the degree to which a disclosure is sufficiently "public" is a factual question for the district court). Accordingly, the Ninth Circuit should have remanded to the district court the questions underlying the 1986 FCA's jurisdiction provision.

2. The Ninth Circuit's Holding That No Public Disclosure Occurred Conflicts With Other Appellate Decisions.

Notwithstanding respondents' admission that their post-1986 claims were based upon the Government's disclosure of its audit reports, the Ninth Circuit held that no public disclosure occurred. While the court stated that it did not "definitively resolve the question of public disclosure" because it found respondents to be original sources, App. at 14a, the opinion nevertheless strongly suggests that: (a) the Government's release of an audit report to the subject of the audit is not a public disclosure, and (b) a relator can base new allegations of false claims on a Government audit report obtained during discovery.

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these questions presented as issues on appeal. Thus, the parties were not afforded a fair opportunity to offer into the record all of the evidence bearing on the application of the 1986 FCA's jurisdiction requirements.

The decision, if upheld, has dangerous practical implications. Whenever the Government discloses audit findings to contractor personnel, as it does routinely and did here,[15] any employee would be free to file *qui tam* actions based on that information. Given the financial incentives provided by the FCA, such a rule, if upheld, could result in every Government audit spinning off its own parasitic *qui tam* action by a company employee or even by a Government auditor.[16]

Perhaps for these reasons, most courts – other than the Ninth Circuit – have interpreted the public disclosure provision to prohibit such actions. The Second Circuit, rejecting the relators' contention that "public disclosure" meant disclosure to the public at large, held that the Government's disclosure of alleged misconduct to anyone outside the Government, including innocent employees of the contractor under investigation, constitutes a public disclosure. *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992).[17] The *Doe* court explained that once such a disclosure occurred, "the government can no longer throw a cloak of secrecy around the allegations; they are irretrievably released into the public domain," thereby rendering

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[15] While the court did not mention the disclosure of the audit findings to Lockheed personnel, the record indicates that such a disclosure occurred prior to the filing of the original action. *See* ER 746, Ex. 14 and Ex. 21. Such disclosure is consistent with DCAA's guidelines that state that DCAA "routinely provides copies of draft reports for all audits . . . to the contractor being audited for review and comment." DCAA Audit Manual § 10-212.2 (1996). The earlier version of the Manual noted that disclosure is subject to the contracting officer's approval. § 10-213.3 (1983).

[16] *See United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1005 (10th Cir. 1996) (FCA does not specifically preclude *qui tam* action by Government auditor).

[17] *See also United States ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 553 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993).

qui tam enforcement unnecessary under the balanced approach adopted by Congress. *Id.*[18/]

A similarly pragmatic and correct interpretation of "public disclosure" was articulated by the Third Circuit, which held that documents are deemed "public disclosures" in the context of a civil "hearing" whenever they are produced to a party in discovery. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991). *See also United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993).[19/]

Thus, there are two conflicts among the courts of appeals ripe for resolution here – (a) whether an audit report disclosed to employees of the audited contractor is a public disclosure, and (b) whether information obtained in civil discovery in a *qui tam* action can be used to allege additional false claims. This Court's guidance will dictate what evidence Lockheed would present to the district court on remand, whether it is the evidence of the Government's disclosure to Lockheed personnel prior to the filing of the original action, or evidence of what was disclosed to respondents during discovery, or both.

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[18] The Ninth Circuit's decision in *Schumer* explicitly rejected the holding and rationale of *Doe*, fearing that such a rule "forecloses many insiders from bringing qui tam actions." 63 F.3d 1512, 1519 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997). This Court granted certiorari to resolve the conflict but did not reach the question in its decision.

[19] In *Stinson* and *Kreindler* the relators based their *qui tam* claims on information obtained in discovery in a prior lawsuit. The Ninth Circuit noted in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992) that "[e]vidence publicly disclosed for the first time during the discovery phase of a qui tam suit is not barred from use in that same suit . . . ." In *Wang*, the relator sought to rely on a document disclosed during discovery that he believed supported his existing claims. Here, although the relators obtained their information via discovery in their *qui tam* action, they seek to use that information, not as supporting evidence, but rather as the basis for adding claims to their action. Congress did not contemplate that the *qui tam* provisions would be used in this manner.

3. The Ninth Circuit's Holding That Newsham and Bloem Are "Original Sources" Conflicts With Other Appellate Decisions.

To qualify as an original source, a relator must have "direct and independent knowledge of the information on which the allegations are based" and must have "voluntarily provided the information to the Government [prior to] filing the action." 31 U.S.C. § 3730(e)(4)(B). Respondents here fail on both requirements as a matter of law. They admittedly base part of their post-1986 claims set forth in their proposed first amended complaint upon Government audit reports that they received *from* the Government. As other decisions illustrate, the FCA is intended to reward relators for providing information *to* the Government, not vice versa.

For example, the Tenth Circuit has held that "[d]irect and independent knowledge is knowledge marked by the absence of an intervening agency[,] unmediated by anything but the relator's own labor . . . [and] not derivative of the information of others." *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999) (quotation marks and citation omitted). The court held that the relators' conclusory assertions about the source of their knowledge were insufficient:

> To establish original source status knowledge, a qui tam plaintiff must allege specific facts – as opposed to mere conclusions – showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with competent proof. Only this way will the district court be able to adequately identify legitimate qui tam actions and weed out parasitic plaintiffs who offer only secondhand information, speculation, background information or collateral research.

Id. at 1162-63.[20]

Here, the Ninth Circuit erred in finding that respondents were original sources of their post-1986 claims. The court found "it is undisputed that the relators directly observed the nonproductive labor and improper billing that form the heart of their allegations." App. at 14a. The court also found "[i]t is also undisputed that the relators voluntarily supplied this information to the DCAA auditors in 1984." *Id.* But there was no factual basis for finding that these issues were "undisputed," and none was cited.

Newsham could not possibly have "directly observed" any of the events occurring after 1986 because her employment was terminated in 1984. App. at 8a. Similarly, it defies logic to hold – as the Ninth Circuit did here – that respondents supplied information to the Government in 1984 about conduct that allegedly occurred after 1986. Moreover, because Bloem never disclosed anything to the Government (App. at 8a) there is no basis for concluding that he satisfied the voluntary disclosure prong of the FCA's original source requirement.[21]

The key fact mentioned by the Ninth Circuit – but apparently overlooked in its legal analysis – was that "[t]he relators asserted that they did not learn of the basis for some of these [post-1986] claims until they conducted discovery after the 1988 filing of the original complaint." App. at 13a. The record reflects that

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[20] *See also Advanced Sciences, Inc.*, 99 F.3d at 1007 (relator who had merely "overseen" the preparation of audits did not qualify because he had not "discovered the facts" himself); *Bank of Farmington*, 166 F.3d at 864, (even though relator had direct knowledge of the fact that she had issued a guarantee to the Bank, her allegation that the Bank had lied to the Government about the existence of the guarantee was "dependent" upon publicly disclosed information); *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("secondhand information" is not "direct").

[21] A *qui tam* relator bears the burden of establishing subject matter jurisdiction by a preponderance of evidence. *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 540 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1457 (1999).

Newsham and Bloem admitted the post-1986 allegations contained in their proposed first amended complaint were based in part upon information obtained from audit reports provided to them by the Government during discovery. Respondents' Brief at 19; ER 746 at 10-15.

Further, in their Ninth Circuit briefs, respondents argued that at the time of Newsham's 1984 disclosure to DCAA, she had no information whether or how Lockheed charged the Government for the idle time and nonproductive activities. Respondents' Brief at 12, 19, 30 and 38. If that were true, Newsham had no information whether any false claims had been submitted.[22/] Accordingly, Newsham's disclosures about alleged non-productivity during her period of employment would not be sufficient to qualify her as an original source. "While it is not necessary for a relator to have all the relevant information in order to qualify as 'independent,' [the relator does not qualify if he] has no direct and independent knowledge of the allegedly false statements." *United States ex rel. Mistick PBT v. Pittsburgh Housing Authority*, 186 F.3d 376, 388 (3d Cir. 1999) (citations omitted) (relator knew that the product proposed by the contractor was inadequate, but did not learn of the contractor's misrepresentation until he obtained the allegedly false statements from a Freedom of Information Act request), *pet'n for cert. filed*, No. 99-969 (Dec. 8, 1999).[23/]

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[22] When respondents made this argument to the district court in an effort to save their pre- and post-1986 claims, the district court stated:

> Aside from the ethical and Rule 11 implications this position raises with respect to an admission by Relators that they had no evidence in support of their claims at the time that they filed this lawsuit, this argument completely fails to address the *information* the government had when the action was originally filed in 1988.

App. at 35a.

[23] The Ninth Circuit's decision here conflicts not only with the other cases cited herein but also with decisions by other Ninth Circuit panels. In *United States ex rel. Devlin v. State of Calif.*, 84 F.3d 358, 361 (9th Cir.), *cert. denied*, 519 U.S. 949 (1996), the relators were found unqualified because they learned of

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Here, because respondents' post-1986 claims are not based upon their personal observations, but rather on DCAA audit reports and other discovery obtained from the Government, the panel erred in finding respondents to be original sources. The court's holding, if left to stand, would serve as a conflicting authority giving rise to a wave of parasitic *qui tam* actions – a result not intended in the balanced approach that Congress sought to achieve.

III. THE NINTH CIRCUIT'S APPLICATION OF CALIFORNIA'S ANTI-SLAPP STATUTE IN AN FCA ACTION IS CONTRARY TO THIS COURT'S DECISION IN *HANNA* AND DECISIONS OF VARIOUS COURTS OF APPEALS.

In what was stated to be an issue of first impression in federal court, the Ninth Circuit held that California's Anti-SLAPP statute should be applied to Lockheed's counterclaims. In so doing, the appellate court failed to properly apply this Court's decisions that guide the application in a federal proceeding of such a statute. Instead, the Ninth Circuit improperly applied principles that conflict with those applied by several other courts of appeals.

The Anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, is a procedural law.[24/] It is designed to curtail lawsuits brought to discourage the valid exercise of constitutional rights of freedom

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the alleged wrongdoing from an employee of the defendant and "did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else." *See also, United States ex rel. Harshman v. Alcan Elec. and Eng'g, Inc.*, No. 98-35194, 1999 WL 795970, *4-7 (9th Cir. Oct. 7, 1999) (employee knew his salary did not comply with prevailing rules, but he did not qualify as an original source because he obtained the company's alleged false certifications of compliance from court records in a prior proceeding).

[24] Section 425.16 is "a mere rule of procedure." *Ludwig v. Superior Court*, 43 Cal. Rptr. 2d 350, 360 (1995).

of speech and petition for the redress of grievances.[25/] *Id.* Under this state law, a defendant may file a special motion to strike which must be heard within thirty days. Pending the hearing, discovery is stayed with limited exception. *Id.* at ¶¶ (f) and (g). The motion must be granted unless the plaintiff establishes a probability that he or she will prevail. *Id.* at ¶ (b).

The objective of this law, dismissal of frivolous lawsuits with the potential imposition of penalties (attorneys' fees), is also provided for by the Federal Rules of Civil Procedure ("FRCP"). Additionally, the procedures in this statute conflict with the procedures in the FRCP. For these reasons, as explained below, the Court should clarify the important issue of when state law may be applied in a federal proceeding, and should reverse the holding of the Ninth Circuit on this issue.

A. The Federal Rules of Civil Procedure Cover Motions Directed to Meritless Claims.

In concluding that the Anti-SLAPP statute should be applied here, the Ninth Circuit reversed the district court, which had found that the California law conflicted with Rules 8, 12(f), 12(b)(6) and 56 of the FRCP. The Ninth Circuit supported its conclusion by stating that the FRCP and the Anti-SLAPP law "'can exist side by side . . . without conflict.'" App. at 19a (*quoting Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)). The appellate court added that the FRCP Rules in question and the Anti-SLAPP law "do, in some respects, serve similar purposes" but that "Rules 8, 12 and 56 were [not] intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims." *Id.* The court concluded that the twin purposes of the rule in *Erie R.R.. v. Tompkins*, 304 U.S. 64 (1938), – "'discouragement of forum-shopping and avoidance of inequitable administration of the law'" – favored application of

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[25] Lockheed's counterclaims were directed to relators' failures to notify their employer of their allegations regarding alleged false claims until after they were no longer working for the company. As such, those claims were unrelated to any of relators' constitutional rights.

the California law in federal cases.[26/] App. at 20a. The court erred.

The basic principles to be followed in considering whether to apply state rules in a federal proceeding were set forth in *Hanna v. Plumer*, 380 U.S. 460, 471 (1965):

> When a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Here, no one suggests that FRCP Rules 8, 12 and 56 transgress either the Enabling Act or the Constitution. Therefore, if the "situation" is covered by one or more of these Rules, they apply and the state rule does not. The proper test is not whether, as the Ninth Circuit stated, these Rules were intended to "occupy the field" or whether they "can exist side by side" with the state rule "without conflict" (though as explained below the Anti-SLAPP procedures directly conflict with the FRCP).

The Anti-SLAPP special motion to strike is most like a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. To the extent that the special motion to strike is supported by affidavits, it is similar to a Rule 56 motion for summary judgment. Either rule may be utilized to weed out meritless claims, and if such an instance is found, Rule 11 is available for imposing sanctions, including attorneys' fees. Thus, the FRCP cover the situation addressed by the Anti-SLAPP statute and *Hanna* therefore requires that the FRCP, not the state rule, apply.

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[26] The *Erie* considerations are relevant to diversity actions. False Claims Act cases such as this one are not diversity actions and present no opportunity for forum-shopping.

B. The Anti-SLAPP Statute Conflicts With the Federal Rules of Civil Procedure.

Moreover, not only does the FRCP cover the situation, the procedures required by the Anti-SLAPP law conflict with the procedures specified in Rules 8, 12 and 56 of the FRCP.

As noted above, a special motion to strike requires dismissal of a suit "unless the court determines that the plaintiff has established there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b). In contrast, a federal court decides a motion to dismiss in compliance with the standards set by Rules 8 and 12. Among others, these standards include the requirement that the complaint be read liberally, that all well-pleaded allegations be deemed true, and that dismissal generally be with leave to amend. *Conley v. Gibson*, 355 U.S. 41, 99 (1957). Thus, whereas the Anti-SLAPP law requires plaintiff to *prove* his allegations are true, FRCP 8 and 12 proceedings deem them to be proven. Moreover, the Anti-SLAPP special motion to strike requires specificity in the pleadings; FRCP 8 permits notice pleading. State standards that put a more onerous burden on the nonmoving party conflict with Rules 8 and 12. Thus, the procedures required by the special motion to strike collide with those for a Rule 12(b)(6) motion to dismiss.

Additionally, the filing of a special motion to strike suspends discovery at the beginning of a case. In contrast, a Rule 56 motion for summary judgment is decided only after a sufficient discovery period. Subdivisions (f) and (g) of the Anti-SLAPP statute allow the defendant to file a special motion to strike immediately upon being served with the complaint. This filing automatically stays all further discovery. Although a plaintiff can file a motion showing good cause and the court "may" permit "specified discovery," subdivisions (f) and (g) create a default rule that allows the defendant to immediately put the plaintiff to proof before the plaintiff can conduct discovery. In contrast, this Court has stated that Rule 56(f) requires delay in judgment "where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This is particularly true when the summary judgment motion raises

issues such as motive, intent, knowledge or credibility and the moving party has exclusive control over those facts. 10B Charles Wright *et al.*, Federal Practice and Procedure §§ 2740, 2741 (1998). It also comports with the purpose of Rule 56(f), which is "to provide an additional safeguard against an improvident or premature grant of summary judgment." *Id.*

Thus, California's special motion to strike and FRCP Rule 56 are in stark conflict. The special motion to strike was designed to allow a party defending a SLAPP action to resolve the matter as early as possible, before extensive discovery. Rule 56 was designed to ensure that the nonmoving party would not be forced to defend a summary judgment motion without the opportunity to marshal supporting evidence. These divergent goals directly collide. Therefore, the special motion to strike cannot apply in federal court. When a state procedural rule conflicts with a FRCP, the federal rule controls. *See Walker*, 46 U.S. at 745 n.9; *Burlington N. R.R. v. Woods*, 480 U.S. 1, 7 (1987); Rules Enabling Act, 28 U.S.C. § 2072.

The Ninth Circuit's holding that the State procedural motion to strike should apply in federal court is inconsistent with decisions in other circuits that have held that federal courts should apply FRCP Rule 56 rather than state criteria for summary judgment proceedings. *E.g., Doe v. Doe*, 941 F.2d 280, 287 (5th Cir. 1991); *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 459 (6th Cir. 1986); *Lavin v. New York News, Inc.*, 757 F.2d 1416, 1419 (3d Cir. 1985).

IV. IF THE PETITION IS NOT GRANTED, IT SHOULD BE HELD PENDING THIS COURT'S DECISION IN *STEVENS*.

An additional important question not addressed above is the constitutionality of the *qui tam* provisions. Although Lockheed argued in the district court that the *qui tam* provisions are unconstitutional (CR 46, CR 47), it did not raise that issue with the Ninth Circuit because the Ninth Circuit had previously held

them to be constitutional. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).[27/] The Fifth Circuit, however, recently held that they are not constitutional. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, No. 97-20948, 1999 WL 1034213, *reh'g en banc granted*, 1999 WL 1034216 (5th Cir. Nov. 15, 1999). That decision has been vacated pending *en banc* review. Subsequently, this Court requested briefing on whether *qui tam* relators have Article III standing to bring FCA suits. *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, No. 98-1828, 1999 WL 1045146 (Nov. 19, 1999).

Because the Government has declined to intervene in this case, this Court's decision in *Stevens* could be dispositive here. Accordingly, if the Petition is not granted, it should be held pending a decision in *Stevens*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 21, 1999

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[27] Lockheed did not waive the issue by not raising it in the Ninth Circuit. An issue that was not raised below is not waived if raising it would have been futile. *Knapp v. Ernst & Whitney*, 90 F.3d 1431, 1439 (9th Cir. 1996), *cert. denied*, 519 U.S. 1122 (1997).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, EX REL.,

Plaintiff,

MARGARET A. NEWSHAM; and MARTIN OVERBEEK BLOEM,

Plaintiffs-Counter-Defendants-Appellants-Cross-Appellees,

vs.

LOCKHEED MISSILES & SPACE COMPANY, INC.,

Defendant-Counter-Claimant-Appellee-Cross-Appellant.

Nos. 97-16704
98-15111

D.C. No.
CV-88-20009-JW

ORDER AND
AMENDED
OPINION

Appeals from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
November 6, 1998 – San Francisco, California

Filed March 24, 1999
Amended September 10, 1999

Before Betty B. Fletcher and A. Wallace Tashima,
Circuit Judges, and Robert J. Bryan,[1] District Judge.

Opinion by Judge Bryan

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[1] The Honorable Robert J. Bryan, United States District Judge for the Western District of Washington sitting by designation.

COUNSEL

Guy T. Saperstein, Morris J. Baller, Susan Guberman-Garcia, Jeremy Friedman, Christopher J. Keller, Law Offices of Saperstein, Goldstein, Demchak & Baller, Oakland, California, for the plaintiffs-counter-defendants-appellants-cross-appellees.

James J. Gallagher, Martin H. Kresse, Robert S. Brewer, Jr., Barbara J. Bacon, Law Offices of McKenna & Cuneo, Los Angeles, California, for the defendant-counter-claimant-appellee-cross-appellant.

ORDER

The slip opinion (slip op.) filed March 24, 1999 is amended as follows:

On slip op. 2615, in the second sentence of the first full paragraph, delete "for making the allegations at issue in this case."

On slip op. 2616, delete n.7.

On slip op. 2619, in the second sentence of the second full paragraph, delete "the original".

On slip op. 2621, in the fifth line, add "some of" between "for" and "these".

On slip op. 2626, in the fifth line, replace "diversity cases" with "court".

On slip op. 2629, replace the heading "*I.*" with roman numeral "**III.**"

On slip op. 2621, delete the final paragraph, as well as the two succeeding pages through the bottom of slip op. 2623, and replace with:

> We are not persuaded by this argument. Here, following the teaching of *Morongo*, we begin with the original complaint, filed in January 1988. The original complaint alleged improper billing both before and after the effective date of the 1986 FCA amendments. For

example, in Paragraph 32 of the original complaint, the plaintiffs alleged that the "pervasive fraud and mischarging of labor hours and materials . . . has continued to the present and is still occurring now." The plaintiffs went on to allege that the defendant "continue[s] to act with actual knowledge of the falsity of the information, and/or in deliberate ignorance and reckless disregard for the truth or falsity of the records, statements, and claims for payment or approval." As discussed above, the district court properly dismissed the pre-1986 claims for lack of subject matter jurisdiction. As to the allegations of improper billing continuing after 1986 ("post-1986 billing allegations"), however, we must apply the jurisdictional bar as modified by the 1986 amendments. If the post-1986 billing allegations can clear this bar, then the district court properly had subject matter jurisdiction over these aspects of the original complaint.

The amended FCA allows "*qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information." *Hughes Aircraft Co.*, 162 F.3d at 1032 (quoting *Schumer*, 117 S. Ct. at 1876); *see* 31 U.S.C. § 3730(c)(4)(A). In other words, "if at the time a relator files a *qui tam* complaint, the allegations or transactions of the complaint have been publicly disclosed, . . . the relator must show that he is an original source of the information in order for a district court to have jurisdiction over the lawsuit." *Biddle*, 161 F.3d at 540. Accordingly, in order to determine if the district court had subject matter jurisdiction over the relators' post-1986 billing allegations, we just resolve two questions: 1) whether the allegations were based upon information that had previously been publicly disclosed, and, if so, 2) whether the relators are original sources of such information. *Id.* at 1032-33.

As to the first inquiry, we ask whether the post-1986 billing allegations repeat "allegations that have already been disclosed to the public." *Biddle*, 161 F.3d at 538. The record before the district court contains no evidence suggesting that the post-1986 billing allegations were publicly disclosed prior to the unsealing of the relators' original complaint.

In any event, because we conclude that the record also supports the conclusion that the relators here were original sources with respect to these allegations, we need not definitively resolve the question of public disclosure. The statute defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). We have elaborated on this statutory definition by demanding that the relator also have "a hand in the public disclosure of the allegations." *Hughes Aircraft Co.*, 162 F.3d 1033 (internal quotations omitted). Here, it is undisputed that the relators directly observed the nonproductive labor and improper billing that form the heart of their allegations. It is also undisputed that the relators voluntarily supplied this information to DCAA auditors in 1984. There is also nothing in the record suggesting these relators "sat quietly in the shadows" until others took up the fight. *Wang v. FMC Corp.*, 976 F.2d 1412, 1419-20 (9th Cir. 1992) (holding that relator must have had a hand in public disclosure of the fraud).

Thus, based on our review of the post-1986 billing allegations contained in the relators' original complaint, we conclude that the district court properly had subject matter jurisdiction over this portion of relators' FCA action. The district court's dismissal of these post-1986 claims must thus be reversed.

The district court also denied relators' motion to amend their complaint based on its erroneous subject matter jurisdiction analysis. Consequently, the above analysis leads us to conclude that this ruling was also erroneous. In their first amended complaint, the relators revised certain factual allegations based on information obtained during discovery, including allegations relating to Lockheed efforts to deceive and mislead DCAA auditors. For the same reasons discussed above, it appears that the district court properly has subject matter jurisdiction over the claims contained in the first amended complaint to the extent such claims are based upon conduct post-dating the effective date of the 1986 FCA amendments.

OPINION

BRYAN, District Judge:

OVERVIEW

The appellants, Margaret A. Newsham and Martin Overbeek Bloem ("relators"), are *qui tam* plaintiffs under the False Claim Act ("FCA"), 31 U.S.C. §§ 3729-3733. The relators alleged that Appellee Lockheed Missiles and Space Company, Inc. ("LMSC") submitted millions of dollars of false claims for excessive nonproductive labor hours on government projects. The relators appeal two of the district court's rulings: 1) dismissal of their claims because the court concluded that it lacked subject matter jurisdiction under the pre-1986 FCA, and 2) refusal to award attorneys' fees under California's Anti-SLAPP[2] statute, Cal. Civ. Proc. Code § 425.16, for the dismissal of LMSC's counterclaims. LMSC appeals the district court's application of Fed. R. Civ. P.

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[2] SLAPP refers to the name and focus of the statute – "Strategic Lawsuit Against Public Participation."

54(d)(1) and equitable considerations to deny LMSC's cost bill for a part of the case that was dismissed.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court in part and reverse in part.

OVERVIEW OF *QUI TAM* ACTIONS

The FCA has two primary purposes: "to alert the government as early as possible to fraud that is being committed against it and to encourage insiders to come forward with such information where they would otherwise have little incentive to do so." *United States ex rel. Biddle v. Board of Trustees of Stanford Univ.*, 161 F.3d 533, 538-39 (9th Cir. 1998) (citations omitted). The FCA established penalties for the commission of fraudulent acts, recoverable in a civil action known as a "*qui tam*" action. *Id.* at 535. The *qui tam* action is brought by a private individual known as a "relator" on behalf of both himself and the government. 31 U.S.C. § 3730(b). Once notified of the action, the government has the option to intervene, or declining intervention and to allow the relator to proceed on its behalf. § 3730(b)(2) and (c)(3). If the *qui tam* action is successful, the relator divides the civil penalties with the government according to § 3730(d). *See Biddle*, 161 F.3d at 538-39.

In the 1930s and 1940s, Congress became concerned about the number of

> parasitic lawsuits copied from preexisting indictments or based upon congressional investigations. Such ill-motivated suits not only diminished the government's ultimate recovery without contributing any new information, but the rush to the courthouse put pressure on the government to make hasty decisions regarding whether to prosecute civil actions.

United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 679-80 (D.C. Cir. 1997). To address this problem, Congress placed limitations on the district court's jurisdiction, first in 1943, then in 1982, in 31 U.S.C. § 3730(b)(4) (1983), which stated: "Unless the Government proceeds with the action, the Court shall dismiss the action brought by the person on

discovering the action is based on evidence or information the Government had when the action was brought."

Over time, Congress learned that this restriction essentially eliminated the financial incentive for private citizens to bring fraudulent conduct, to the attention of the government, and the use of *qui tam* suits to fight fraud on behalf of the government dramatically declined. *Findley*, 105 F.3d at 680. On October 27, 1986, Congress again amended § 3730(b)(4) and recodified it at 31 U.S.C. § 3730(e)(4)(A) (1998). This section provided that "no court shall have jurisdiction over a [*qui tam*] action . . . based upon the public disclosure of allegations in . . . [an] investigation . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A).[3] The effect of this amendment was to "create[] a new cause of action" by eliminating the bar to actions based on information the government already knew, and to allow the original informant to litigate the action. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1878 (1997); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1031 (9th Cir. 1998).

FACTUAL AND PROCEDURAL BACKGROUND[4]

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[3] The full text of 31 U.S.C. § 3730(e)(4)(A) is: No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

[4] From its filing in 1988, this case has had a very long and tortuous procedural history. Our summary contains only those facts necessary to resolve this appeal.

Between 1979 and 1988, LMSC had several "cost-reimbursable"[5] contracts with various defense and intelligence agencies of the United States government. Newsham worked for LMSC as an analyst in its Sunnyvale, California plant from 1981 until she was discharged in 1984. Bloem worked at the same facility as a technician from 1979 until his voluntary termination in 1988. The relators here allege that LMSC filed millions of dollars in false claims for excessive non-productive labor costs, including claims for employees' personal and unrelated business activities and time attributed to "icebox" employees.[6] The relators allege that LMSC billed this time to the government as contract labor hours. For example, the relators allege that one manager supervised the construction, by LMSC employees, of a complete airplane for his personal use at government expense.

In March 1984, Ms. Newsham and her attorney contacted agents of the Defense Contract Audit Agency ("DCAA"), which had responsibility for monitoring contract compliance of defense contractors, including LMSC. Ms. Newsham reported her observations, but she was not able to provide details of how time was billed or invoiced by LMSC, or what instructions LMSC employees had regarding the billing of their time. Mr. Bloem did not participate in that meeting, but the parties have agreed that his claims were indistinguishable from Ms. Newsham's allegations.

After receiving Ms. Newsham's report, the DCAA, in 1984, conducted several "operations" audits, including an ice-box audit and a "non-touch" or non-manufacturing audit. The auditors did not investigate LMSC's time-keeping practices, its accounting for

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5 A "cost-reimbursable" contract is one where the government reimburses LMSC for its costs in carrying out the contract and pays an additional amount as profit.

6 "Icebox" employees were individuals awaiting authorization by the government for "special access" in order to work on high security government contracts. The term "icebox" refers to the secured area where these employees were assigned.

time charges, or the practice of charging for non-productive activities. The auditors found some discrepancies in billings and recommended adjustments, including a recommendation that LMSC reduce nonproductivity.

On January 8, 1988, the relators filed a *qui tam* action against LMSC under seal pursuant to the FCA, 31 U.S.C. § 3730(b)(2).[7] The relators alleged that LMSC knowingly charged labor hours to government contracts for employees engaged in nonproductive or personal activities, and sought damages, penalties, and other relief authorized by the FCA. The complaint was unsealed and served on LMSC in July 1988. In February 1989, the government filed a Notice of Declination to intervene in the case, and left the prosecution of the case to the relators as a private action on behalf of the United States.

Thereafter, LMSC moved to dismiss portions of the complaint for lack of subject matter jurisdiction based on the pre-1986 version of the FCA, 31 U.S.C. § 3730(b)(4) (1983). The issue presented in the motion was whether the 1986 amendment to the FCA should be retroactively applied to a case filed after the amendment, but based on pre-1986 conduct. The district court denied the motion. On June 17, 1991, LMSC filed an answer and counterclaims wherein it denied the relators' claims and brought four California state law counterclaims. LMSC alleged that the relators had breached duties imposed by fiduciary obligations and loyalty, as well as contract and statute, and breached the implied covenant of good faith. The district court referred all pretrial matters to a Special Master pursuant to Fed. R. Civ. P. 53. The district court, on the Recommendation of the Special Master, granted the relators' motion to dismiss LMSC's counterclaims on August 2, 1995 and denied the relators' companion motion to strike and for attorneys' fees based on California's Anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16 (1992), discussed below.

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[7] 31 U.S.C. § 3730(b)(2), in pertinent part, states: "The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders."

The question of the retroactive or prospective application of the FCA's 1986 amendment – 31 U.S.C. § 3730(e)(4)(A) – was settled in *Schumer*, 117 S.Ct. 1871 (1997). There, the Supreme Court held that the statute does not apply retroactively. Based on *Schumer*, LMSC filed a motion for reconsideration, requesting that the relators' claims be dismissed pursuant to the pre-1986 FCA. One week before the hearing on this motion for reconsideration, the relators filed a motion for leave to file an amended complaint. In the proposed amended complaint, the relators brought new FCA claims, alleging that LMSC continued to submit bills for excessive labor costs after October 1986 and gave false information to the auditors which prevented the auditors from uncovering LMSC's alleged fraudulent activities.

On July 31, 1997, the district court issued its Order Dismissing Case after finding that the government had the information on which the case was based when the action was filed. The complaint was dismissed with prejudice as to the relators, and without prejudice as to the United States. The relators' motion to amend the complaint was denied. The relators timely appealed these rulings.

On August 22, 1997, after the district court had dismissed the relators' claims, LMSC filed a Bill of Costs. The district court denied LMSC's application for costs, first finding that LMSC was not a "prevailing party." Thereafter, on December 19, 1997, the district court granted LMSC's motion for reconsideration. The district court then held that LMSC was a prevailing party, but again denied LMSC's Bill of Costs because there was no determination of the relators' claims on their merits, and because an award of costs would result in a severe hardship to the plaintiffs. LMSC filed a timely cross-appeal.

STANDARD OF REVIEW

The standard of review of the district court's order dismissing claims for lack of subject matter jurisdiction is *de novo*. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1153 (9th Cir. 1998). Any findings of fact of the district court are reviewed for clear error. *Tucson Airport Author. v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998). The district court's order denying the

relators' motion to strike LMSC's counterclaims is reviewed *de novo*. *Harvey's Wagon Wheel, Inc. v. Van Blitter*, 959 F.2d 153, 154 (9th Cir. 1992).

The district court's denial of costs is reviewed for an abuse of discretion. *Crowe v. Wiltel Communications Sys.*, 103 F.3d 897, 900 (9th Cir. 1996). Whether the district court has the authority to award costs, however, is a question of law reviewed, *de novo*, *Russian River Watershed Protection Committee v. City of Santa Rosa*, 142 F.3d 1136, 1144 (9th Cir. 1998).

DISCUSSION

I. Whether the district court erred by dismissing the relators' claims based on a) pre-1986 FCA, and b) post-1986 FCA after amendment.

[1] The district court failed to distinguish between pre-1986 claims and post-1986 claims, and as a result, the court erroneously dismissed the entire action. The relators' claims can be divided into two groups: claims charging LMSC with billing the government for excessive nonproductive work time before October 27, 1986 ("pre-1986 claims"), and claims that excessive charges continued after 1986, and that LMSC made false statements and misrepresentations to the DCAA auditors ("post-1986 claims").

A. Pre-1986 claims.

[2] We must first determine which jurisdictional bar to apply to the pre-1986 claims. The Supreme Court in *Schumer* decided the issue of the retroactive application of the 1986 amendment and held that the 1982 version of the FCA should be applied to conduct that occurred before October 1986. *Schumer*, 117 S.Ct. at 1876. Recently, in *Hughes Aircraft Co.*, we decided the issue left unresolved by the *Schumer* decision, that is, "whether the relevant conduct for purposes of non-retroactivity was the act of [the defendant] in presenting a false claim, or the public disclosure of that fact." 162 F.3d at 1031 (citing *Schumer*, 117 S.Ct. at 1876 n. 4). When we considered the unfair effect of the retroactive application of the 1986 amendment, that is to "subject

[the defendant] to a cause of action that did not exist at the time it engaged in the conduct later made actionable," we concluded "the crucial event for purposes of non-retroactivity is the alleged presentation by [the defendant] of a false claim, and not the public disclosure of that conduct." We held that the 1982 version of the FCA applies to all false claims presented before the effective date of the 1986 amendments (October 27, 1986), and that "the 1986 amendment applies to the presentation of false claims after its effective date." *Id.* As a result, we apply the 1982 version of the FCA to the relators' pre-1986 claims, and the post-1986 version to the relators' post-1986 claims.

[3] The 1982 provision of the FCA, 31 U.S.C. § 3730(b)(4), required dismissal of the *qui tam* action if it was "based on evidence or information the Government had when the action was brought." In *Pettis ex rel. United States v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 674 (9th Cir. 1978), we held that the information on which the *qui tam* suit is based must be "sufficient to enable [the United States] adequately to investigate the case and to make a decision whether to prosecute." We stated that to require the information to be a "mirror image" of the relators' claims would "eliminate the bar" but that the government must possess more than "rumors." *Id.*

[4] Here, the relators contacted government officials and reported their observations in 1984, four years before the *qui tam* action was filed. The DCAA found their information to be sufficient to start an investigation and conducted several audits targeted to respond to the relators' allegations. While the government decided not to prosecute the relators' claims, the government had sufficient information on which to base this decision, and possessed that information when the action was brought. There is nothing in the FCA which requires the government to intervene, even if it has sufficient information to justify intervention. We affirm the district court's dismissal of the relators' claims reported before October 1986.

B. Post-1986 claims.

[5] As stated in their proposed amended complaint, the relators' post-1986 claims fall into two categories: 1) post-1986

continuation of excessive labor bills, and 2) false statements and misrepresentations to DCAA auditors. The relators asserted that they did not learn of the basis for some of these claims until they conducted discovery after the 1988 filing of the original complaint. Here, the relators argue that the district court erred in its order of dismissal by relying on *Schumer* because the *Schumer* decision only addressed pre-1986 amendment conduct.

LMSC makes two principal arguments opposing the relators' positions. First, LMSC argues that when determining whether subject matter jurisdiction is proper the court must look to the original complaint and should not consider the post-1986 claims brought by the relators in their proposed amended complaint. LMSC cites *Morongo Band of Mission Indians v. Cal. St. Bd. of Equal.*, 858 F.2d 1376, 1376 (9th Cir. 1988), for the principle that if the district court had no subject matter jurisdiction over the original complaint, then the court had "no power to do anything with the case except dismiss." (citations omitted). The *Morongo* decision goes on to state that, if jurisdiction was lacking, orders issued thereafter are "nullities." *Id.* at 1380.

[6] We are not persuaded by this argument. Here, following the teaching of *Morongo*, we begin with the original complaint, filed in January 1988. The original complaint alleged improper billing both before and after the effective date of the 1986 FCA amendments. For example, in Paragraph 32 of the original complaint, the plaintiffs alleged that the "pervasive fraud and mischarging of labor hours and materials . . . has continued to the present and is still occurring now." The plaintiffs went on to allege that the defendant "continue[s] to act with actual knowledge of the falsity of the information, and/or in deliberate ignorance and reckless disregard for the truth or falsity of the records, statements, and claims for payment or approval." As discussed above, the district court properly dismissed the pre-1986 claims for lack of subject matter jurisdiction. As to the allegations of improper billing continuing after 1986 ("post-1986 billing allegations"), however, we must apply the jurisdictional bar as modified by the 1986 amendments. If the post-1986 billing allegations can clear this bar, then the district court properly had subject matter jurisdiction over these aspects of the original complaint.

[7] The amended FCA allows "*qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information." *Hughes Aircraft Co.*, 162 F.3d at 1032 (quoting *Schumer*, 117 S. Ct. at 1876); *see* 31 U.S.C. § 3730(c)(4)(A). In other words, "if at the time a relator files a *qui tam* complaint, the allegations or transactions of the complaint have been publicly disclosed, . . . the relator must show that he is an original source of the information in order for a district court to have jurisdiction over the lawsuit." *Biddle*, 161 F.3d at 540. Accordingly, in order to determine if the district court had subject matter jurisdiction over the relators' post-1986 billing allegations, we must resolve two questions: 1) whether the allegations were based upon information that had previously been publicly disclosed, and, if so, 2) whether the relators are original sources of such information. *Id.* at 1032-33.

[8] As to the first inquiry, we ask whether the post-1986 billing allegations repeat "allegations that have already been disclosed to the public." *Biddle*, 161 F.3d at 538. The record before the district court contains no evidence suggesting that the post-1986 billing allegations were publicly disclosed prior to the unsealing of the relators' original complaint.

[9] In any event, because we conclude that the record also supports the conclusion that the relators here were original sources with respect to these allegations, we need not definitively resolve the question of public disclosure. The statute defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(c)(4)(B). We have elaborated on this statutory definition by demanding that the relator also have "a hand in the public disclosure of the allegations." *Hughes Aircraft Co.*, 162 F.3d at 1033 (internal quotations omitted). Here, it is undisputed that the relators directly observed the nonproductive labor and improper billing that form the heart of their allegations. It is also undisputed that the relators voluntarily supplied this information to DCAA auditors in 1984. There is also nothing in

the record suggesting these relators "sat quietly in the shadows" until others took up the fight. *Wang v. FMC Corp.*, 976 F.2d 1412, 1419-20 (9th Cir. 1992) (holding that relator must have had a hand in public disclosure of the fraud).

[10] Thus, based on our review of the post-1986 billing allegations contained in the relators' original complaint, we conclude that the district court properly had subject matter jurisdiction over this portion of relators' FCA action. The district court's dismissal of these post-1986 claims must thus be reversed.

[11] The district court also denied relators' motion to amend their complaint based on its erroneous subject matter jurisdiction analysis. Consequently, the above analysis leads us to conclude that this ruling was also erroneous. In their first amended complaint, the relators revised certain factual allegations based on information obtained during discovery, including allegations relating to Lockheed efforts to deceive and mislead DCAA auditors. For the same reasons discussed above, it appears that the district court properly has subject matter jurisdiction over the claims contained in the first amended complaint to the extent such claims are based upon conduct postdating the effective date of the 1986 FCA amendments.

II. Whether California's Anti-SLAPP law should be applied to the dismissal of LMSC's state law counterclaims.

[12] California's Anti-SLAPP law, Cal. Civ. Proc. Code § 425.16 was passed in January 1993 in response to the legislature's concern about civil actions aimed at private citizens to deter or punish them for exercising their political or legal rights. *Wilcox v. Superior Court*, 27 Cal.App.4th 809, 33 Cal.Rptr.2d 446 (1994).[8] The hallmark of a SLAPP suit is that it lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that

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[8] The *Wilcox* decision contains a comprehensive history of the SLAPP statute.

the citizen party's case will be weakened or abandoned, and of deterring future litigation. 27 Cal.App.4th at 816, 33 Cal.Rptr.2d at 450. The *Wilcox* decision goes on to observe that "[b]ecause winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, and requests for sanctions) are inadequate to counter SLAPPs." 27 Cal.App.4th at 817, 33 Cal.Rptr.2d at 450. Therefore, the California legislature looked for procedural and substantive remedies for the prompt exposure, dismissal, and discouragement of SLAPP suits. *Id.*

[13] Section 425.16(a) states its purpose:

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

Section 425.16(b)(1)[9] provides that when a SLAPP suit is filed, it "shall be subject to a special motion to strike," which is akin to a motion to dismiss. In order to prevail, a citizen party must make a prima facie showing that the SLAPP suit arises from any act by

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[9] Section 425.16(b)(1) and (2) states in the entirety:

> (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> (2) In making its determination, the court shall consider the pleadings, and supporting the opposing affidavits stating the facts upon which the liability or defense is based.

the citizen party "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." *Id.*; *see also* § 425.16(e) (defining "an act in furtherance of a person's right of petition or free speech"); *Wilcox*, 27 Cal.App.4th at 820, 33 Cal.Rptr.2d at 452. To make this determination, the court "shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." § 425.16(b); *Wilcox*, 27 Cal.App.4th at 821, 33 Cal.Rptr.2d at 453. The burden then shifts to the SLAPP plaintiff to establish by a "reasonable probability" that the [SLAPP] plaintiff will prevail on the claim and that the [citizen party's] "purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses." 27 Cal.App.4th at 824-25, 33 Cal.Rptr.2d at 455. *See also Bradbury v. Superior Court*, 49 Cal.App.4th 1108, 1117, 57 Cal.Rptr.2d 207, 213 (1997). The prevailing party on a special motion to strike is entitled to attorney's fees and costs to compensate them for the expense of responding to the SLAPP suit and the motion. § 425.16(c);[10] *Robertson v. Rodriguez*, 36 Cal.App.4th 347, 362, 42 Cal.Rptr.2d 464 (1995). The issue of the application of this statute in federal court is one of first impression.

To address this issue, some additional procedural background is helpful. In June 1991, LMSC filed its counterclaims based on California state law against the relators, alleging breach of duties imposed by fiduciary obligations and loyalty, as well as by contract and statute and the implied covenant of good faith. At

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10 Section 425.16(c) states in its entirety:

> (c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

that time, the Anti-SLAPP statute had not yet passed. The district court first dismissed the counterclaims on December 9, 1991. The court reasoned that such counterclaims were barred in *qui tam* litigation because they would "be a strong deterrent to genuine informer's actions, and contrary to the public policy underlying the [*qui tam*] statute," and "would allow wrongdoers to retaliate against whistleblowers, and [be] contrary to legislative intent."

The counterclaims were reinstated on July 14, 1994 based on *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993), wherein we held that a *qui tam* defendant could bring counterclaims for damages independent of a *qui tam* defendant's liability. The relators again moved to dismiss and to strike the counterclaims under both Fed. R. Civ. P. 12(b)(6) for failure to state a claim and the Anti-SLAPP statute, § 425.16. The relators also sought attorneys' fees and costs pursuant to § 425.16(c). On the recommendation of the Special Master, the district court granted the relators' motion to dismiss and denied their motion to strike and for attorneys' fees and costs. The court found that certain Federal Rules of Civil Procedure directly conflicted with the Anti-SLAPP statute: Rule 8 (requiring specificity in pleadings), Rule 12(f) (motions to strike), Rule 12(b)(6) (motions to dismiss for failure to state a claim), and Rule 56 (motions for summary judgment).

The relators argue that the district court's erroneous refusal to apply the Anti-SLAPP statute denied them of their substantive rights to attorneys' fees and costs under California state law, and failed to carry out the goals of *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938).

In determining whether the relevant provisions of California's Anti-SLAPP statute may properly be applied in federal court, we begin by asking whether such an application would result in a "direct collision" with the Federal Rules. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980); *Olympic Sports Prods., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 901, 914 (9th Cir. 1985). According to LMSC, California's statutory regime necessarily collides with Rules 8, 12, and 56. We disagree.

Only two aspects of California's Anti-SLAPP statute are at issue: the special motion to strike, Cal. Civ. P. Code § 425.16(b),

and the availability of fees and costs, Cal. Civ. P. Code § 425.16(c).[11] We conclude that these provisions and Rules 8, 12, and 56 "can exist side by side ... each controlling its own intended sphere of coverage without conflict." *Walker v. Armco Steel*, 446 U.S. at 752. A *qui tam* plaintiff, for example, after being served in federal court with counterclaims like those brought by LMSC, may bring a special motion to strike pursuant to § 425.16(b). If successful, the litigant may be entitled to fees pursuant to § 425.16(c). If unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment. We fail to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of Rule 8, 12, or 56. In summary, there is no "direct collision" here.

LMSC correctly points out that the Anti-SLAPP statute and the Federal Rules do, in some respects, serve similar purposes, namely the expeditious weeding out of meritless claims before trial. This commonality of purpose, however, does not constitute a "direct collision" – there is no indication that Rules 8, 12, and 56 were intended to "occupy the field" with respect to pretrial procedures aimed at weeding out meritless claims. *Cf. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 556 (1949) (holding that a state law requiring posting of bond in shareholder derivative suits could be enforced in addition to, and consistently with, Rule 23). The Anti-SLAPP statute, moreover, is crafted to serve an interest not directly addressed by the Federal Rules: the protection of "the constitutional rights of freedom of speech and petition for redress of grievances." Cal. Civ. P. Code § 425.16(a).

[14] In the absence of a "direct collision" between a state enactment and the Federal Rules, we must make the "typical, relatively unguided *Erie* choice." *Hanna v. Plumer*, 380 U.S. at 471; *accord* 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4511 (2d ed. 1996).

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[11] Accordingly, we express no opinion regarding the applicability of any other provisions of Cal. Civ. P. Code § 425.16 in federal court.

First, we note that LMSC has not identified any federal interests that would be undermined by application of the anti-SLAPP provisions urged by the relators here. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-40 (1958) (balancing state and federal interests in deciding whether to apply state law requiring that immunity question must go to judge, rather than jury). On the other hand, as noted earlier, California has articulated the important, substantive state interests furthered by the Anti-SLAPP statute. *See* Cal. Civ. P. Code § 425.16(a); *Wilcox*, 33 Cal.Rptr. at 451; *cf. Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211, 2220 (1996) (in applying state law in diversity action, finding that while the state law at issue was plainly procedural, its objective was manifestly substantive).

We also conclude that the twin purposes of the *Erie* rule – "discouragement of forum-shopping and avoidance of inequitable administration of the law" – favor application of California's Anti-SLAPP statute in federal cases. *Hanna*, 380 U.S. at 468; *see also Gasperini*, 116 S.Ct. at 2220 n.8. Although Rules 12 and 56 allow a litigant to test the opponent's claims before trial, California's "special motion to strike" adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by an entitlement to fees and costs. Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the "twin aims" of the *Erie* doctrine.

[15] For these reasons, we hold the district court erred in finding that subsections (b) and (c) of California's Anti-SLAPP statute could not be applied to LMSC's counterclaims. Because the district court concluded that the Anti-SLAPP statute was inapplicable, it did not rule on the relators' motion to strike, nor on their motion for fees and costs. We remand on the district court so that it may rule on these issues.

III. Whether LMSC's appeal of the district court's application of Fed. R. Civ. P. 54(d)(1) to deny LMSC's cost bill is moot.

[16] Because we reverse and remand in part for further proceedings, this litigation is not yet concluded, and it is premature to address costs. LMSC's appeal of the district court's denial of its costs bill is moot, and should be dismissed.

CONCLUSION

On relators' appeal, No. 97-16704, we affirm in part and reverse and remand in part for further proceedings. LMSC's appeal, No. 98-15111, is dismissed as moot. Relators shall recover their costs on appeal as to both appeals.

No. 98-15111 **DISMISSED**. No. 97-16704 **AFFIRMED in part, REVERSED AND REMANDED in part.**

APPENDIX B

[Filed September 22, 1999]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, EX REL., Plaintiff, MARGARET A. NEWSHAM; and MARTIN OVERBEEK BLOEM, Plaintiffs-Counter-Defendants-Appellants-Cross-Appellees, v. LOCKHEED MISSILES & SPACE COMPANY, INC., Defendant-Counter-Claimant-Appellee-Cross-Appellant.	No. 97-16704 No. 98-15111 D.C. NO. CV-88-20009-JW ORDER

Before: B. FLETCHER and TASHIMA, Circuit Judges, and BRYAN,* District Judge.

* The Honorable Robert J. Bryan, United States District Judge for the Western District of Washington sitting by designation.

The panel has voted to deny both petitions for rehearing. Judge Tashima votes to deny Lockheed Missiles and Space Company's petition for rehearing en banc and Judges Fletcher and Bryan so recommend.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on en banc hearing. Fed. R. App. 35(b).

The petitions for rehearing and the petition for rehearing en banc are denied.

APPENDIX C

[Filed August 2, 1995]

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel., MARGARET A. NEWSHAM and MARTIN OVERBEEK BLOEM, *Plaintiffs,* vs. LOCKHEED MISSILES AND SPACE COMPANY, INC., *Defendant.*	Case No. C 88-20009 JW ORDER GRANTING PLAINTIFFS' MOTION TO DISMISS; AND DENYING PLAINTIFFS' MOTION TO STRIKE AND FOR ATTORNEY'S FEES

INTRODUCTION

The Special Master has filed a recommendation to (1) Grant Relators' Motion to Dismiss Counterclaims; and (2) Deny Relators' Motion to Strike and for Attorney's Fees under California Anti-Slapp Statute. Lockheed Missiles and Space Company, Inc. ("Lockheed") did not file an objection to the Master's recommendation to Grant Relators' Motion to Dismiss Counterclaims. Qui tam Plaintiffs and Counter-Defendants object to the Master's recommendation to deny their Motion to Strike and for Attorney's Fees. For the reasons expressed below, the Court hereby DISMISSES Lockheed's Counterclaims and

BACKGROUND

Plaintiffs ("Relators") seek damages under the False Claims Act, 31 U.S.C. § 3729, et seq. ("FCA"), for alleged mischarging by Defendant Lockheed under Government contracts. To meet the requirements of the FCA, Relators filed disclosure statements concerning the alleged mischarging with the Department of Justice before filing this qui tam action.

Lockheed filed four counterclaims against Plaintiffs for (1) breach of fiduciary duty; (2) breach of written contract, (3) breach of obligations under the California Labor Code, and (4) breach of implied duty of good faith and fair dealing. On December 9, 1991, this Court issued an order striking the counterclaims. On reconsideration, the Court reinstated the counterclaims. In reinstating the counterclaims, the Court did not consider whether Lockheed's counterclaims stated facts sufficient to constitute a claim.

Relators now move to discuss the counterclaims under Fed. R. Civ. P. 12(b)(6) and to strike the counterclaims under California's recently adopted anti-SLAPP (Strategic litigation against public participation) statute. Cal. Civ. Proc. Code § 425.16.

DISCUSSION

1. Motion to Dismiss

The Special Master has filed a recommendation that the Court GRANT Relators' Motion to Dismiss Lockheed's counterclaims. There being no objection to the Master's recommendation, the Court hereby GRANTS Relators' Motion to Dismiss Lockheed's counterclaims.

2. Motion to Strike

California Code of Civil Procedure Section 425.16 provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution in connection with a public issue shall be

> subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

California Civil Procedure Section 425.16 also provides for an award of attorney's fees and costs incurred by a defendant (here cross-defendant) in successfully challenging claims (here counterclaims) which are within the scope of the statute.

Because Lockheed's counterclaims have been dismissed, Lockheed cannot show that it has a probability of prevailing on the counterclaims, making Lockheed liable to Relators for their attorney's fees if the Anti-Slapp statute applies in this case.

The issue before the Master was whether the California Anti-Slapp statute applies when a federal court is exercising supplemental jurisdiction over state law claims. The issue is one of first impression.

Relators argued that the question is governed by the Rules of Decision Act ("RDA"), 28 U.S.C. § 1652, as it has been interpreted by Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny. Relators claimed, among other things, that California's Anti-Slapp statute applies here because this federal court cannot enforce a state-created right and grant recovery to Lockheed where a state court would not do so. Since the California statute would bar recovery in state court, so too must it bar recovery here.

Lockheed argued that the Anti-Slapp statute is "procedural" in nature, and that this Court's adoption of the statute would impermissibly conflict with the Federal Rules governing specificity in pleading [Rule 8(a)], motions to strike [Rule 12(f)], motions to dismiss for failure to state a claim [Rule 12(b)(6)] and motions for summary judgment [Rule 56]. To support its position, Lockheed relied on the Supreme Court's decision in Hanna v. Plumer, 380 U.S. 460 (1965), which upheld Federal Rule 4(d)(1) over a conflicting state statute.

Applying the Erie doctrine, the Master found that the California Anti-Slapp statute does not apply to this proceedings since it conflicts directly with Rules 8, 12 and 56 of the Federal Rules. Because the Master found that the Anti-Slapp statute does not apply here, the Master made no findings as to whether Lockheed's counterclaims are directed to the Relators' acts in furtherance of their rights of petition or free speech under the United States Constitution in connection with a public issue, as required by the statute.

Relators object to the Master's recommendation, arguing that the Master failed to address the underlying principles of Erie and its progeny: to protect against the inequitable administration of the laws and the discriminatory application of rules that foster forum shopping between state and federal courts. Relators urge that analysis of these concerns compel application of the Anti-Slapp statute in this federal action. Moreover, Relators claim that there is no conflict between the California statute and the Federal Rules since the Federal Rules do not address the public policies embodied in the Anti-Slapp statute either expressly or by implication.

Relators also argue that if the Court finds that the Anti-Slapp statute conflicts with the Federal Rules such that Relators are not entitled to attorney's fees and costs, then the identified Federal Rule limits Relators' substantive rights and therefore exceeds the Rules Enabling Act.

The Court has conducted a *de novo* review of Relators' Motion to Strike. The Court finds that the California Anti-Slapp statute conflicts directly with Rules 8, 12 and 56 of the Federal Rules. Accordingly, the Anti-Slapp statute does not apply to this proceeding and Relators' Motion to Strike and for Attorney's fees is DENIED.

IT IS SO ORDERED.

DATED: August 2, 1995

/s/ James Ware
JAMES WARE
United States District Judge

APPENDIX D

[Filed July 31, 1997]

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel., MARGARET A. NEWSHAM, et al., *Plaintiffs,* vs. LOCKHEED MISSILES AND SPACE COMPANY, INC., *Defendant.*	Case No. CV-88-20009-JW ORDER[1] DISMISSING CASE

Defendant Lockheed Missiles and Space Company's ("Lockheed") motion for reconsideration of the Court's Amended Order issued on November 8, 1995 was heard by the Court on July 31, 1997. James Gallagher presented oral argument on behalf of Lockheed and Guy T. Saperstein argued on behalf of Relators. Based on all papers filed to date, as well as on the oral argument of counsel, the Court grants Lockheed's motion for reconsideration of its prior Order and, dismisses this action. The Court finds that the Supreme Court's holding in Hughes Aircraft Company v. United States ex rel. Schumer, No. 95-1340, 1997

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[1] This disposition is not appropriate for publication and may not be cited.

WL 321246 (June 16, 1997), requires that the Court's prior decision be vacated and this action be dismissed.

I. BACKGROUND

Plaintiff/Relator Margaret Newsham ("Newsham") began working for Lockheed in March of 1981. Newsham worked for Lockheed until her termination in March of 1984. Plaintiff/Relator Martin Bloem was hired by Lockheed in 1979 and worked for Lockheed until 1988. In 1984, Newsham notified the Defense Contract Audit Agency ("DCAA") Regional Audit Manager Robert Lloyd and supervisory auditor David Eck that she thought Lockheed was pervasively submitting false charges regarding its labor hours on government contracts to the federal government.

In 1985, as a result of Newsham's allegations, DCAA conducted operations audits to verify Newsham's disclosures regarding excessive levels of nonbusiness activities at Lockheed. These audits reviewed the "Ice Box" operations and were designed, according to Relators, to check the efficiency and economy of Lockheed's operations, but were not conducted in order to evaluate the possibility of overcharging to the government.

In 1988, Newsham and Bloem filed a lawsuit against Lockheed under the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. Pursuant to 31 U.S.C. § 3730, an individual is permitted to bring a civil action for false claims made to the government. The individual bringing the suit is referred to as a qui tam plaintiff or relator.[2] The FCA requires that the lawsuit be brought for the person and for the government. The government is given the option to enter and assume the primary responsibility for the

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[2] The term qui tam comes from the Latin phrase "qui tam pro domino rege quam per se ipso in hac parte sequitur," which means "who brings the action for the king as well as for himself." The Court refers to Newsham and Bloem as Relators.

prosecution of the action. If the government assumes responsibility, the individual who initiated the action is entitled to recover a percentage of any recovery or settlement. If the government elects not to enter the action, the individual may continue to prosecute the action and, if successful, recover a higher percentage of any recovery or settlement.

Up until 1986, the FCA provided that unless the government proceeded with the action, the court was required to dismiss the action upon discovering that the action was based on information the government possessed when the action was commenced. The FCA required dismissal of an individual's case even if the government's source of its information came from the individual who filed suit. Therefore, prior to 1986, Newsham would be precluded from proceeding with her lawsuit against Lockheed if the Court found that her report to the DCAA prior to the filing of this action meant that the government had prior notice.

In 1986, the FCA was amended to, among other things, permit an individual to proceed with a suit even if the government had notice of the offending conduct if the individual was the original source of the government's information. Thus, at the time Newsham filed the lawsuit in 1988, as an original source, she was allowed to sue Lockheed even if the government had notice of the offending conduct by Lockheed.

In 1989, Lockheed moved to dismiss the suit on the ground that the 1986 Amendments could not be retrospectively applied to 1984 events. Lockheed contended that the applicable law was the version of the FCA which was in effect at the time of its conduct.

United States District Court Judge Robert P. Aguilar denied the motion, relying on Bradley v. School Board of City of Richmond, 94 S.Ct. 2006 (1974), which held that a court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direct or legislative history to the contrary." Id. at 2016. Judge Aguilar held that the 1986 Amendments, which were in effect at the time of Newsham's lawsuit, applied. Since the FCA as amended allowed an original source plaintiff to bring suit, and Newsham alleged that she was the original source of the government's knowledge, she could file suit.

In 1990, the case was transferred from Judge Aguilar to this Court. In a ruling on other issues in the case, this Court noted that Judge Aguilar had previously decided that the 1986 Amendments to the FCA applied to the case.

On April 26, 1994, the United States Supreme Court decided Landgraf v. USI Firm Products, 114 S.Ct. 1483 (1994). The Supreme Court attempted to reconcile the conflict between applying "the law in effect at the time it renders its decision," articulated in Bradley, 94 S.Ct. at 2016, with the presumption against retrospective application articulated in Bowen v. Georgetown Univ. Hospital, 109 S.Ct. 468, 471 (1988). While not overruling Bradley, the Supreme Court substantially limited the "law in effect at the time it renders its decision" doctrine.

Lockheed then moved for reconsideration of Judge Aguilar's 1989 ruling that the 1986 Amendments to the FCA applied to this case. Lockheed argued that under Landgraf, the 1986 Amendments may not be applied and that Newsham's complaint must be dismissed. In an Order dated November 8, 1995, the Court found that 31 U.S.C. § 3730(e)(4)(A) applied to this case and, therefore, granted jurisdiction to the Court to hear Relators' claims.

On June 16, 1997, the United States Supreme Court issued its decision in Hughes Aircraft Company v. United States ex rel. Schumer, No. 95-1340, 1997 WL 321246, in which it held that 31 U.S.C. § 3730(e)(4)(A), the 1986 amendment to the FCA, does not apply retroactively to false claims submitted to the government prior to the amendments. The Court held that Schumer's case should have been dismissed under the pre-1986 FCA since it was based on "evidence or information the Government had when the action was brought." Schumer 1997 WL 321246 at *6.

Based on the decision in Schumer, Lockheed now requests that the Court reconsider its November, 1995 Order and find that the 1986 amendments to the FCA do not apply retroactively to the

false claims submitted to the government prior to 1986 and, therefore, dismiss this case.[3]

Relators agree that, based on the holding in Schumer, the Court should reconsider its November Order. However, Relators argue that the Schumer holding does not require dismissal of any of the claims herein since the government did not possess the information and evidence upon which this action is based prior to the 1986 amendments.

II. LEGAL STANDARDS

A. Reconsideration

The Court has the authority and discretion to reconsider its orders under Rule 54(b) of the Federal Rules of Civil Procedure, which provides in relevant part:

> [A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civil P. 54(b) (1995).

The November 8. 1995 Order granting in part and denying in part Lockheed's motion for reconsideration was interlocutory. The Ninth Circuit has espoused three grounds upon which a motion for reconsideration may be based: 1. an intervening change in controlling law; 2. the availability of new evidence; or, 3. the need to correct clear error or prevent manifest injustice. Painting Industry of Hawaii Market Recovery Fund v. United States Department of the Air Force, 756 F. Supp. 452, 453 (D. Hawaii

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[3] Lockheed argues that the entire action should be dismissed based on the holding in Schumer, with the exception of ¶s 24 and 25 which involve allegations by Relator Bloem.

1990). These requirements are codified in Civil Local Rule 7-9(b).

B. Dismissal

In ruling on a motion to dismiss based on the face of the complaint, the court must accept as true all allegations of material fact and must construe said allegations in the light most favorable to the non-moving party. Western Reserve Oil & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enterprises, 476 F.2d 393, 396 (9th Cir. 1973).

However, these presumptions do not apply when the motion to dismiss is based on extrinsic evidence. Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981). In an instance when extrinsic evidence is considered pursuant to a Rule 12(b)(1) motion, the court may weigh and determine conflicting facts and the burden of proof is on the plaintiff, the party who invoked jurisdiction, to establish that jurisdiction is proper. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

In addition, extrinsic evidence may be considered by the court on a motion to dismiss for failure to state a claim under Rule 12(b)(6), in which case the motion is converted into a motion for summary judgment under Rule 56. Fed. R. Civ. Proc. 12(b)(6). However, matters as to which the court may take judicial notice are not considered to be "outside the pleadings". Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987).

A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts stated under a cognizable theory. Robertson v. Dean Witter Reynolds Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). In order to grant a motion to dismiss, it must appear to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved. Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987).

III. DISCUSSION

Since the parties agree that the Supreme Court's holding in Schumer requires that the Court reconsider its Order issued in November of 1995, it is unnecessary to discuss such holding and its effect on this action. Based upon the agreement of the parties, the Court reconsiders its Order of November, 1995 and vacates such Order based upon the holding in Schumer. The Court must now analyze whether Relators' claims survive based on the pre-1986 version of the FCA.

As noted above, prior to the 1986 amendments to the FCA, a *qui tam* action could not be maintained unless the government proceeded with the action. The court was required to dismiss the action upon discovering that the action was based on information the government possessed when the action was commenced. The FCA required dismissal of an individual's case even if the government's source of its information came from the individual who filed suit. 31 U.S.C. § 3730. In 1982, Section 3730(b)(4) provided:

> [u]nless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C.A. § 3730(b)(4) (1983) (emphasis added).

By amending this section, Congress determined that courts did not have the ability to entertain a case when the government had prior knowledge of the events upon which the action was based and declined to intervene. Based on this Congressional mandate, the Court must now determine if the present action is "based on evidence or information the Government had when the action was brought".

In support of their argument that the present action should not be dismissed, Relators argue that their action is based entirely on evidence which has only been uncovered through the discovery process of this action. According to Realtors, the government could not have possessed the evidence necessary to support

Relators' claims because they themselves did not possess such evidence until very recently in the discovery process.

Aside from the ethical and Rule 11 implications this position raises with respect to an admission by Realtors that they had no evidence in support of their claims at the time that they filed this lawsuit, this argument completely fails to address the information the government had when the action was originally filed in 1988. Based on the allegations contained in Relators' own complaint, they acknowledge that:

> Shortly after her termination on or about March 27, 1984, plaintiff Newsham's attorney contacted the Defense Contract Audit Agency ("DCAA") through its telephone hotline, and complained to the DCAA of the conduct witnessed by Newsham and alleged above. On August 1, 1984, Newsham and her attorney met with representatives of the DCAA to discuss her allegations. The DCAA subsequently investigated the claims and prepared reports substantiating Newsham's allegations.

Realtors' Complaint, ¶ 28, emphasis added.

Based on Realtors' own allegations, Newsham's attorney disclosed all of the information alleged in the complaint to the government in 1984 prior to filing this lawsuit in 1988. Therefore, based on their own admissions, Realtors have shown that this action is based on information that the government knew of since 1984 and clearly, therefore, had when the case was filed in 1988. This is all that is needed under 31 U.S.C. § 3730(b)(4) as it read prior to 1986.

The fact that the evidence necessary to support such allegations may not have been uncovered until the discovery process of this litigation does not change this result since § 3730(b)(4), as it read prior to 1986, bars any action "based on evidence or information" which the government possessed at the time that the action was filed. The complaint unequivocally states that all of the information and conduct alleged therein was reported to the government. Clearly, the government possessed sufficient information to enable it to investigate Relators' claims.

See, Pettis ex rel. United States v. Morrison-Knudsen Co., Inc., 577 F.2d 668, 673 (9th Cir. 1978).

Accordingly, Relators' arguments and analysis regarding the state of the evidence in the case is irrelevant to the Court's determination as to whether the action must be dismissed based on the holding in Schumer and § 3730 as it read prior to 1986. Based on such factors, the Court finds that this action must be dismissed because it is based on information which the government possessed at the time that the action was filed in 1988.

In reaching its conclusion, the Court also makes two additional findings. First, Lockheed does not move to dismiss Bloem's allegations contained in ¶s 24 and 25, that Bloem's time cards were sometimes filled out by Lockheed supervisors and did not always relate to the actual time spent on government projects and that a senior Lockheed manager had a complete airplane built for his own use and billed the time to the government, respectively. However, the Court finds that such allegations are sufficiently similar to the remaining allegations contained in the complaint and alleged by Newsham so as to be indistinguishable from the information conveyed by Newsham's attorney to the government regarding claims of misbilling by Lockheed. Therefore, the Court dismisses this entire action, including Bloem's allegations.

Second, the Court understands that Realtors have filed a motion to file an amended complaint in this action and noticed such motion for hearing on September 8, 1997. Opposition to the motion is not yet due. However, based on its holding herein, as well as its review of the motion, the Court finds that it would be futile to permit such amendment since Relators seek to "plead jurisdictional facts made relevant by the Schumer decision" and to "conform the complaint to the evidence". Neither of these facts overcome the jurisdictional bar imposed by Congress and the Schumer decision on the Court as Section 3730(b)(4) provided prior to 1986. Therefore, Relators' motion to amend the complaint is denied.

IV. CONCLUSION

For the reasons set forth herein, the Court grants Lockheed's motion for reconsideration, vacates its prior Order issued on November 8, 1995 and dismisses this action in its entirety. The Court finds that the basis for dismissal in incureable. Therefore, as to the Relators the dismissal is with prejudice. Based on the *amicus curiae* brief submitted by the United States, the action is dismissed without prejudice to the United States.

DATED: July 31, 1997

/s/ James Ware
JAMES WARE
United States District Judge

APPENDIX E

California Code of Civil Procedure § 425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceeding in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted, notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes, "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(2)

Supreme Court, U.S.
FILED
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No. 99-1060

IN THE

Supreme Court of the United States

LOCKHEED MISSILES AND SPACE COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* MARGARET A. NEWSHAM and MARTIN OVERBEEK BLOEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MARGARET A. NEWSHAM AND MARTIN OVERBEEK BLOEM

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit violated retroactivity principles by applying the False Claims Acts' 1986 Amendments to a contractor's fraudulent conduct occurring after the effective date of those Amendments?

2. Whether the Ninth Circuit erred in noting that there did not appear to be any public disclosure of the information on which the action is based, although it did not have to determine that issue with finality?

3. Whether the Ninth Circuit erred in making the factual finding that Respondents were the original sources of the information on which the action is based?

4. Whether the Ninth Circuit violated the *Erie* doctrine by permitting the application of a California law providing special defenses to counterclaims under state law which deterred the exercise of constitutional rights, based on the findings that the state law's purpose was not coextensive with that of the federal procedural rules and there was no clear conflict between the state and federal rules?

PARTIES TO THE PROCEEDING

Respondents Margaret A. Newsham and Martin Overbeek Bloem were appellants in the court of appeals on the issues presented in the Petition (and appellees on a cross-appeal raising other issues not presented here), and *qui tam* relators in the district court.

Petitioner Lockheed Missiles and Space Company was appellee in the court of appeals on the issues presented here (and appellant on the cross-appeal).

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Respondents, Margaret A. Newsham and Martin Overbeek Bloem, respectfully request that this Court deny the Petition for a Writ of Certiorari filed on December 21, 1999, seeking review of the court of appeals' judgment in this case. The court of appeals' opinion is reported at 190 F.3d 963 (9th Cir. 1999) and reprinted in the Appendix ("App.") at 1a–21a. The court of appeals denied Petitioner's Petition for Rehearing and/or Rehearing En Banc on all of the issues presented here, with no Judge of that court requesting a vote on whether to hold an *en banc* rehearing. (App. 23a).

COUNTER-STATEMENT OF THE CASE

This case was nine and one-half years old at the time it was dismissed, on jurisdictional grounds, by the district court; and eleven and one-half years old by the time the court of appeals' decision reinstated the case. The underlying facts involve labor charging practices and invoices submitted to the United States by Petitioner Lockheed Missiles and Space Company ("LMSC") both before and after October 27, 1986, the effective date of the pertinent jurisdictional provision of the 1986 Amendments to the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). The first issue presented in the Petition, one of "retroactivity", turns on this unique and temporally remote factual setting.

The court of appeals, in deciding the jurisdictional issues presented to it, differentiated between the two periods. It found that the district court lacked jurisdiction over claims based on invoices submitted before October 27, 1986, but had jurisdiction over claims based on invoices submitted after that date. The court of appeals' decision finding no jurisdiction over pre-1986 claims is not before this Court. The Petition seeks review of the ruling upholding jurisdiction over the post-1986 claims.

The "retroactivity" issue presented by the Petition arises in the unusual factual context of pre-1986 activities that were allegedly both: (i) known to the government and (ii) similar to the post-1986 conduct on which the court of appeals allowed the action to proceed. The Petition glosses over one critical fact, which it fails to mention in its discussion of "pre-1986 claims" and "post-1986 claims". The "claims" involved in this case are not just arbitrary categories based on division of the time period covered by Respondents' case into pre-Amendments and post-Amendments portions (*see* Pet. at 9 n.7). Instead, Respondents' action against Petitioner is based on LMSC's periodic submissions of numerous, individual invoices for payment — each of which constitutes a "claim" to the United States and each of which, Respondents allege, was false. (ER 752-A, para. 39).[1] Petitioner submitted some of those "claims" — those which are not pertinent to issues before this Court — prior to the effective date of the 1986 Amendments. It submitted others *after* that date, and in those invoices sought payment for work allegedly done by LMSC employees *after* the Amendments' effective date. Those post-1986 claims are the only ones involved in this case.

Several factual assertions in LMSC's Statement of the Case are misstated or erroneous. Respondent Newsham's 1984 disclosures to the DCAA alleged that LMSC employees who were supposed to be working on government contracts were in fact idle or not working on contract matters; however, the disclosures did not contain information about how the LMSC employees had been instructed to bill their time or had in fact billed their time. (ER 752-A, paras. 25-26). The DCAA's audit of these disclosures did not encompass any analysis or determinations pertaining to LMSC's billing practices, in particular the contention that LMSC had falsely

1. Although Petitioner dismisses the Respondents' First Amended Complaint as "irrelevant," (Pet. at 9 n.8), the court of appeals correctly ordered it to be filed. (App. 15a).

charged the government on contract accounts for idle or non-business activities of employees. (ER 746, Exs. 28-35; ER 752-A, paras. 26, 29, 32). Petitioner's factual assertions to the contrary (Pet. at 3, 4) are unfounded. Likewise, the Petition makes unsubstantiated assertions that the DCAA audited "all of Newsham's allegations," and that in concluding the government had "no claim against Lockheed" the DCAA had reviewed and found meritless the allegation of fraudulent charging (Pet. at 3, 4).[2]

REASONS FOR DENYING THE WRIT

The Petition raises no issues that warrant review in this Court.

(A) The factual setting in which Petitioner here urges the existence of a conflict is itself unique, non-recurring, and increasingly unimportant with the passage of time. This Court has recently articulated clear principles to guide decisions on retroactivity issues. In *Landgraf v. USI Film*

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2. Petitioner's only citation for these contentions is to an *amicus curiae* brief of the United States (SER 41) which does not constitute evidence and which itself cites no evidence for the propositions advanced. In fact, the DCAA audits found extremely high levels of non-productivity (*see* ER 752-A, paras. 27-28, 31), and invoked the remedy of forward-looking cost adjustments which was DCAA's customary sanction for overbilling. (*Id.* at para. 32).

LMSC refers to another incorrect fact, and incorrectly suggests that it has some basis, in citing to the district court's observation that " '[t]he parties agree that under the pre-1986 [FCA], the portions of the *qui tam* complaint based on plaintiff Newsham's allegations would have to be dismissed.' " (Pet. at 5). In fact, Respondents never made any such concession, and neither the district court's comment in passing nor the statement in the United States' *amicus curiae* brief (SER 41 at 8), which Petitioner also cites (Pet. at 5), has any value as evidence.

Products, 511 U.S. 244 (1994), the Court set out the pertinent general principles; and in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Court explained how those principles apply to the jurisdictional provision governing *qui tam* actions under the 1986 Amendments to the False Claims Act, 31 U.S.C. § 3730(e)(4)(A) (1986).

The court below correctly applied those principles in determining that the application of the 1986 Amendments provision to Petitioner's post-Amendments conduct was not a "retroactive" application of the Amendments. The decision below does not conflict with either this Court's retroactivity decisions, or any other appellate decisions that remain viable authority. The single earlier panel decision of the Ninth Circuit which forms the basis of Petitioner's claimed conflict argument has been vitiated by *Schumer* and is no longer followed by the Ninth Circuit itself.

(B) There is no reason to review the judgment below on the jurisdictional issues framed by Section 3730(e)(4)(A), as modified by the 1986 Amendments. The court below made factual findings in determining that there was no evidence of any public disclosure in this case, and in any event the court had jurisdiction because Respondents were original sources of the information on which the action is based. The other appellate decisions in which Petitioner purports to find conflicts with the decision below involve much different factual settings and, for the most part, were exactly the type of "parasitic" actions that the 1986 Amendments were designed to bar.

(C) There is no reason to review the Ninth Circuit's proper application of California's anti-SLAPP law in the adjudication of the state law counterclaims in this case. The question presented is a unique one that has never arisen before

and is likely to remain rare. No final judgment has been entered on the anti-SLAPP motion in this case. The anti-SLAPP law does not "directly collide" with the Federal Rules of Civil Procedure, and the state law embodies substantive policies protecting individuals from lawsuits designed to restrict their exercise of First Amendment rights. The court below correctly applied the *Erie* Doctrine and did not violate the teaching of *Hanna v. Plumer*, 380 U.S. 460 (1965), when it held that the state law applied in this case.

I.

THE COURT OF APPEALS' DECISION APPLYING THE 1986 AMENDMENTS' STANDARD TO FALSE CLAIMS SUBMITTED BY PETITIONER AFTER THE EFFECTIVE DATE OF THE AMENDMENTS RAISES NO QUESTION OF CONTINUING IMPORTANCE AND DOES NOT CONFLICT WITH OTHER APPELLATE DECISIONS.

The decision below found the 1986 FCA Amendments' jurisdictional provisions applicable to Respondents' claims based on invoices submitted by LMSC after October 27, 1986 for work allegedly performed by LMSC employees after that date. That decision raises no "retroactivity" issue worthy of this Court's review, and does not conflict with any decisions of this Court or any other federal appellate court.

(1) The keystone contention underlying Petitioner's position is that the "allegedly false claims submitted after 1986 [were] *merely a continuation* of alleged improper charging practices known to the Government prior to 1986" (Pet. at 12) (emphasis added). This factually unfounded contention is dependent on case-specific facts unlikely to be found in many, if any, other cases at this time, 14 years after enactment of the 1986 Amendments. *Every* invoice submitted

by LMSC which remains the subject of this action[3] was based on work allegedly performed after the effective date of the 1986 Amendments and was presented for payment after that date. Each such invoice constitutes a separate "claim" for False Claims Act purposes. *See* S. Rep. No. 345, 99th Cong. 2d Sess. 9 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5269 *citing United States v. Bornstein*, 423 U.S. 303 (1976). Such invoices were not a "mere continuation" of prior claims, but were separate charges for work performed during the later time period.

Petitioner's argument is entirely dependent on its contention, which is contradicted by the facts summarized immediately above, that the practices challenged in this case began before October 27, 1986 and continued in similar form thereafter. At this point in time, the number of other cases involving such practices (even if they existed here) is small if not non-existent, and sure to diminish over time to none. Review of this issue by this Court would probably affect no case other than the case at bar.[4]

(2) The court of appeals' decision applying the 1986 Amendments' provisions to post-Amendments claims is a routine application of the principles established in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and in no way conflicts with that decision. As required by *Landgraf*, the court of appeals decision gives effect to the time-honored

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3. In the portion of the opinion on which review is not sought here, the court of appeals barred Respondents' claims based on invoices submitted prior to October 27, 1986. (App. 12a).

4. Petitioner cites no other currently pending cases which present the same question in its unique factual setting, and Respondents' counsel are unaware of any such cases. It is scarcely conceivable that any could be brought in the future due to statute of limitations considerations.

"principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place," *Landgraf*, 511 U.S. at 265 (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).[5] In this case, where the law as enacted in the 1986 Amendments was applied to conduct that took place after those Amendments became effective, the presumption against "retroactive legislation" never comes into play because the 1986 Amendments provision is not being applied to pre-Amendments conduct but only to discrete post-Amendments conduct.

The decision below properly applies the holding of *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871 (1997), and does not conflict with it. All of the conduct involved in *Schumer* occurred prior to the 1986 Amendments, 520 U.S. at __, 117 S. Ct. at 1875. Here, Petitioner submitted its false claims after the date of the Amendments. *Schumer* precludes application of the 1986 Amendments' jurisdictional provision only to pre-Amendments conduct, *id.*, 117 S. Ct. at 1878-1879.

If *Landgraf* and *Schumer* applied here in the way that Petitioner contends, the effect of that application would be to validate post-1986 Amendments fraudulent practices similar to conduct commenced before 1986 and known to the government. Such an interpretation would turn the retroactivity principles of *Landraf* and *Schumer* on their head, and thwart the intent of Congress in enacting the 1986 Amendments. That purpose was to prohibit certain fraudulent conduct prospectively — not to immunize it in perpetuity.

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5. Likewise, the court of appeals' decision gives effect to this Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871 (1997), by holding that the court had no jurisdiction over pre-1986 Amendments claims. (App. 12a).

Landgraf and *Schumer* establish clear retroactivity principles applicable to the 1986 Amendments. There is no need to revisit their holdings in this context. To apply those holdings in the way urged by Petitioner would both confuse and undermine these clearly established principles.

(3) The Petition's attempt to fabricate a conflict at the circuit court of appeals level, on the question of *which* conduct is relevant for the retroactivity analysis — the government contractor's submission of false claims or the relator's disclosure thereof — is also unsubstantiated. Petitioner's assertion of a conflict rests entirely on a single panel opinion of the Ninth Circuit, *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) ("*Anderson I*"). *Anderson I* is factually inapposite here[6] and has been superseded as a statement of the Ninth Circuit's view of the law on this point.[7] The Ninth Circuit itself has recognized

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6. *Anderson I* involved *only* claims submitted before the date of the 1986 Amendments, not, as here, claims that followed the Amendments and allegedly "continued" pre-Amendments practices. 52 F.3d at 812, 814. In addition, in *Anderson I*, as in all other cases on the point, the submission of the false claims preceded their disclosure. *Id.*

The illogical quality of Petitioner's contention in this case — that Respondent Newsham's disclosure of LMSC's post-1986 Amendments submissions preceded the submissions themselves — both reflects and explains the uniqueness of the factual setting of the question presented here.

7. *Anderson I* was decided prior to this Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). As the Third Circuit pointed out in *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 411 (3rd Cir. 1999), the *Schumer* decision rejected the logical underpinning of

(Cont'd)

that the binding effect of prior panel decisions is removed when, as here, a "Supreme Court decision . . . undermines those decisions." *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1441 (9th Cir.), *cert. denied*, 513 U.S. 1044 (1994). *Anderson I* therefore lacks continuing force as authority.[8]

The Ninth Circuit has twice demonstrated that it has abandoned the holding of *Anderson I* which Petitioner advances as the source of an inter-circuit conflict with *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3rd Cir. 1999).[9] There is thus no current conflict on this

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(Cont'd)
Anderson I's holding — the erroneous belief that "the 1986 amendment did not change the legal consequences of [the contractor's] conduct." The court in *Cantekin* observed that the *Schumer* decision's "reasoning would be in deep tension, if not outright conflict, with using the date of disclosure instead of the date of submission for determining retroactivity," and found that this Court's analysis [in *Schumer*] "strongly supports using the . . . date the allegedly false claim was submitted" in determining whether the Amendments were being retroactively applied. 192 F.3d at 409-410.

8. Nor does Petitioner's citation to the Ninth Circuit panel's unpublished opinion in the *Anderson II* decision, *United States ex rel. Anderson v. Northern Telecom, Inc.*, 141 F.3d 1179 (TABLE), No. 96-36152, 1998 WL 141179 (9th Cir. March 27, 1998), add anything to its argument. Under Ninth Circuit Rule 36-3, such an unpublished decision is non-precedential and may not be cited in the Ninth Circuit. Moreover, even though *Anderson I*'s holding may have been reiterated, it still lacks viability post-*Schumer*.

9. The first such decision was *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1031 (9th Cir. 1998), in which the court held that it is the government contractor's conduct, not the relator's, to which retroactivity analysis applies. The second is the opinion below, reiterating that same holding. (App. 11a-12a).

retroactivity point between the law of the Ninth Circuit, as confirmed in the opinion below, and the law of the Third Circuit or any other court of appeals.[10]

II.

THE OPINION BELOW IS NOT IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS APPLYING THE TWO ELEMENTS OF THE 1986 AMENDMENTS' JURISDICTIONAL PROVISION.

The second and third questions presented involve determinations required by the two prongs of the 1986 Amendments' jurisdictional test for *qui tam* actions, 31 U.S.C. § 3730(e)(4)(A): whether the action was based on information "publicly disclosed" prior to its filing, and if so whether the relator was "an original source" of the information. Both of these issues are highly fact-dependent, as Petitioner concedes (Pet. at 18), and in this posture do not present broadly applicable questions of law.

(1) The question presented in the Petition regarding the "public disclosure" test was not squarely decided by the court below. The Ninth Circuit merely observed that there was "no evidence suggesting" pre-lawsuit public disclosure here, and that the court need not decide the public disclosure question because Respondents met the "original source" test. (App. 14a) This Court is properly reluctant to grant *certiorari* in order to review questions not finally decided below. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (per curiam).

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10. To the extent the Petition's argument is based on an alleged split of authority *within* the Ninth Circuit, that problem is both illusory here for reasons explained in the text and not ordinarily a proper basis for invoking this Court's power of review. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

The decisions cited by Petitioner as in conflict with the decision below on the "public disclosure" question involve different facts and different issues. In *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992), 21 federal agents executing a search warrant took over the government contractor's premises during business hours and discussed the alleged fraud with numerous "innocent" employees who happened to be present, many of whom knew nothing about the fraud allegations. 960 F.2d at 319-320, 322-23. The Second Circuit held this constituted a "public disclosure" barring a *qui tam* action brought by an attorney for one of the contractor's employees based on the same allegations of fraud. *Id.* at 323. The other cases advanced by Petitioner — *United States ex rel Stinson, Lyons, Gerlin & Bustamente, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991), and *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir.), *cert. denied*, 508 U.S. 973 (1993) — were, like *Doe*, *qui tam* actions brought by lawyers who learned about the alleged frauds only through their representation of clients in litigation which produced discovery material containing information about the fraud. Those decisions present paradigm examples of the sort of parasitic claims that the "public disclosure" and "original source" requirements were specifically designed to preclude.

The decision below does not conflict with Petitioner's attorney-relator trilogy of authorities. The degree of public disclosure involved in civil litigation (the *Stinson* and *Kreindler* cases) or in discussions with all employees present in a workplace (the *Doe* case) far exceeds that involved in private communication of a non-public audit report to officials of the audited company — especially where the company selects its representatives, as LMSC did.

(2) The Petition's effort to find a conflict between the decision below and decisions of other appellate courts on the question presented regarding the "original source" test is also

strained. As the Third Circuit succinctly observed in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante*, *supra*, 944 F.2d at 1161, "[t]he paradigmatic 'original source' is a whistleblowing insider" who is a "close observer[] or otherwise involved in the fraudulent activity," *citing* legislative history, S. Rep. No. 345, *supra*, at 4. *See also United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Construction Co.*, 183 F.3d 1088, 1092 (9th Cir. 1999) (similar language describing the "archetypal" relator). Respondents fit this description exactly.

As both courts below found, the DCAA audit report resulted from Respondents' disclosure of their "direct and independent" knowledge of the fraud in Respondent Newsham's 1984 complaint to the DCAA. (App. 29a, App. 8a-9a) Respondent's knowledge of the relevant facts did not originate in the governmental documents. These facts distinguish this case from both of the decisions cited by Petitioner as embodying a conflict, *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999), and *United States ex rel. Mistick PBT v. Pittsburgh Housing Authority*, 186 F.3d 376 (3rd Cir. 1999), *pet. for cert. filed*, No. 99-969 (December 8, 1999).[11] There is no inconsistency between the factual findings of both courts below that Respondents were original sources in this case (App. 30a, App. 14a), and the findings that the relators in *Hafter* and *Mistick* were not "original sources."[12]

11. In *Hafter*, the relator failed to show any personal basis for the knowledge of fraud. 190 F.3d at 1163. In *Mistick*, the relator's knowledge was not personal but derived from documents obtained from the Department of Housing and Urban Development through a FOIA request, which as the court noted is a public source. 186 F.3d at 388-89.

12. Petitioner's attempt to secure review of the determination by two courts below that Respondents were original sources runs counter to this Court's traditional reluctance to review findings of fact made by the district court and concurred in by the court of (Cont'd)

Petitioners' authorities acknowledge that "it is not necessary for a relator to have *all* the relevant information in order to qualify as 'independent'." *Stinson*, 944 F.2d at 1160; *see also Mistick*, 186 F.3d at 389; *Hafter*, 190 F.3d at 1163 (emphasis supplied); and *Wang v. FMC Corp.*, 975 F.2d 1412, 1418-19 (9th Cir. 1992) (to be an original source, relator must have "played a part" in the disclosures), citing *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16-17 (2nd Cir. 1990) (relator must be "directly or indirectly" responsible for disclosure). Since Respondents clearly possessed some of the information, and caused the government auditors to uncover additional information, there is no conflict between the decision below finding Respondents "original sources" and the other decisions cited in the Petition.[13]

III.

THE APPLICATION OF CALIFORNIA'S ANTI-SLAPP LAW TO THIS CASE AS ORDERED BY THE NINTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS.

(1) The fourth question presented by the Petition, relating to the application by the court below of California's anti-SLAPP[14] law, Cal. Code Civ. Proc. § 425.16, has apparently never before been addressed in any case

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(Cont'd)
appeals. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

13. Insofar as the Petition relies on allegedly conflicting panel opinions within the Ninth Circuit (Pet. at 23 n.23), this ground does not support granting the Petition. *See* footnote 10 at p. 10, *supra*.

14. "SLAPP" stands for strategic lawsuit against public participation. "Public participation" connotes the exercise of First Amendment freedoms. (App. 15a-16a).

(*see* App. 17a). This is not surprising, since that issue could only arise where a federal court's supplemental jurisdiction is invoked for a state law SLAPP claim brought against a party exercising his First Amendment rights.

Petitioner cites no other states' laws, nor any other California law, whose applicability in federal court cases might be affected by this Court's review of the decision below. To address such a question before it has been entertained in more than one lower court, and in the absence of any square conflict or indication of exceptional importance, would be an unusual exercise of this Court's discretionary certiorari power.

Moreover, the decision below did not finally resolve Respondents' anti-SLAPP claim. As the Ninth Circuit noted (App. 20a), the district court did not rule on Respondents' motion to strike or motion for fees. The district court merely held the anti-SLAPP law inapplicable (App. 27a), and the court below reversed. The court of appeals' holding will not be ripe for review until the district court enters, and the court below reviews, a final order on the Respondents' anti-SLAPP motions. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, *supra*, 389 U.S. 327.

(2) The decision of the court below on the anti-SLAPP issue is in harmony, and not in conflict, with prior decisions of this Court and other appellate courts on related questions. In asserting the purported conflict, Petitioner relies primarily on this Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965). *Hanna* was only this Court's first discussion of the particular standard for deciding whether a rule of state law is impermissibly inconsistent with a federal rule of procedure, and therefore warrants an exception from the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). This Court explained and limited the *Hanna* exception to *Erie* in two following

cases — *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), and *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987) — whose directly applicable holdings Petitioner does not mention.

Under *Walker* and *Burlington Northern*, the vague standard invoked in the Petition - whether the "situation" at issue is "covered by" the relevant federal rule — is a first step in the analysis, not the ultimate test as Petitioner urges. (Pet. at 26). Those authorities require, for the *Hanna* exception to come into play, that the purposes of the federal and state rules must be not merely similar or related, as the Petition suggests, but "co-extensive"; and that the state law must be in "direct collision" with the federal rule, and the resulting conflict must be "unavoidable." *Walker*, 446 U.S. at 749-50; *Burlington Northern*, 480 U.S. at 4-5. The decision below follows those standards.

(3) Comparison of the Federal Rules of Civil Procedure and the California anti-SLAPP law produces nothing approaching the type of conflict that must be found under *Walker* and *Burlington Northern* to justify failure to apply the anti-SLAPP law consistent with *Erie* doctrine and the goal of "sensitivity to important state interests and regulatory policies," *Gasperini v. Center for Humanities*, 518 U.S. 415, 426 n.7 (1996). As the court below properly found, *see* App. 15a-16a, the anti-SLAPP law addresses only a very limited class of cases for which the California Legislature expressed a very specific set of concerns. The procedural provisions of the anti-SLAPP law address a special motion which is not co-extensive with a motion to dismiss or a motion for summary judgment under Rules 12(b)(6) or 56 of the Federal Rules of Civil Procedure. Rather, the anti-SLAPP law provides a supplemental means of adjudicating questions relevant only to a limited class of California causes of action.

Nothing in the anti-SLAPP law prohibits, or is in direct conflict with, the filing or determination of Rule 12(b)(6) or 56 motions under the Federal Rules.[15] The anti-SLAPP law merely provides an alternative or supplemental procedure for protecting the rights of a particular set of parties (persons exercising the constitutional rights of speech and petition) from a particular type of abusive action (a SLAPP suit). To hold the anti-SLAPP law unavailable in federal court proceedings on state law causes of action, as the Petition urges, would encourage forum-shopping as between federal and state courts in violation of one of the major aims of *Erie*. *See Hanna*, 380 U.S. at 468.[16]

IV.

THE COURT SHOULD DECLINE TO HOLD THIS PETITION PENDING DECISION IN *STEVENS* ON THE CONSTITUTIONALITY OF THE FCA'S QUI TAM PROVISIONS.

The Court should decline to follow Petitioner's suggestion that, if the Petition is not granted, it should be held pending a decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, O.T. 1999,

15. Nor does the decision below require or contemplate substitution of the anti-SLAPP procedures or standards for adjudicating a motion for summary judgment or a motion to dismiss in such an action. Since the court below did not require use of state procedures on a federal Rules-based motion, there is no conflict between its decision and the three Court of Appeals decisions cited by Petitioner in the last paragraph of section III of the Petition (Pet. at 28).

16. Contrary to the Petition's assertion (Pet. at 26 n.26), the opportunity for forum shopping is the same here, where the District Court has federal question jurisdiction of the FCA claim and supplemental jurisdiction of the state law claims, as in a diversity case.

No. 98-1828. That procedure would inflict needless delay on a case that has already been pending for over a decade at the pre-trial stage.

The constitutionality issue taken up by the Court in the *Stevens* case is jurisdictional in nature. If the Court were to deny *certiorari* here and subsequently hold the *qui tam* provisions of the False Claims Act unconstitutional in *Stevens*, Petitioner could renew its motion to dismiss in the courts below without further delay. *See Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 711 (9th Cir. 1992) (party may challenge existence of jurisdiction at any time). The Court should not, therefore, further delay the process of re-starting an already-old case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

LOCKHEED MISSILES AND SPACE COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
MARGARET A. NEWSHAM AND MARTIN OVERBEEK BLOEM,

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States is the largest federation of business companies and associations in the world. It represents well over three million businesses and professional organizations of every size, operating in every sector of business and in every region of the country. Among the Chamber's members, a significant number have contracted to provide goods or services to the United States government in significant amounts.[1]

In this case, the Ninth Circuit held that the 1986 amendment to the False Claims Act (FCA) governs events that occurred before the amendment became effective. The court also held that, under the amended FCA, the disclosure of information either to a contractor's employees or through civil discovery does not constitute "public disclosure" sufficient to bar a *qui tam* action; and that a relator under the FCA can be an "original source" of information even if he provided the government no "direct and independent" information. Important as the decision is to petitioner, the decision has ramifications for scores of other businesses. *Qui tam* suits have proliferated beyond military contracting and have become a major source of federal court litigation in the health care field.[2] *Amicus*'s members have an enduring

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[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

[2] See, *e.g.*, Kikkawa, *Medicare Fraud and Abuse and* Qui Tam*: the Dynamic Duo or the Odd Couple*? 8 HEALTH MATRIX 83, 94-95 (1998) ("[T]he predominant target of *qui tam* suits has shifted from defense contractors to health care providers and other federal program suppliers. In fact, [m]ore than 20% of the *qui tam* cases filed since the 1986 amendments have involved allegations of fraud against the United States Department of Health and Human Services." (internal quotation marks omitted)).

and vital interest in judicial fidelity to the substantial limits that the Supreme Court and Congress have placed on the imposition of such burdens.

In a distinct though equally important part of its decision, the Ninth Circuit held that respondents could bring a "special motion to strike" petitioner's counterclaims under California law. A "special motion to strike" is a state-created procedural rule analogous to, but in conflict with, Federal Rules of Civil Procedure 11, 12 and 56. Its use in federal court is thus forbidden by the Rules Enabling Act, 28 U.S.C. § 2072. The members of *amicus* have an interest in the uniform — and correct — application of procedural rules in the federal courts.

ARGUMENT

I. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION TO APPLY THE 1986 FALSE CLAIMS ACT RETROACTIVELY

In *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), this Court reversed a Ninth Circuit decision and unanimously held that the 1986 amendment to the False Claims Act, Pub. L. No. 99-562, 100 Stat. 3153, does not apply retroactively. Here, however, the Ninth Circuit in effect held the contrary. Its decision allows respondents to pursue a *qui tam* case even though the law at the time the allegations of fraud were disclosed to the government — before 1986 — barred such a suit. This gives the 1986 amendment retroactive scope by changing the legal effect of pre-1986 conduct and events. In the absence of clear congressional language or intent to the contrary, however, an amendment to a statute does not change the legal effect of any conduct engaged in before the effective date of the amendment. The Court should grant review of the Ninth Circuit's erroneous decision.

A. There Is A Strong Presumption Against Retroactive Legislation

Because "the presumption against retroactive legislation is [so] deeply-rooted in our jurisprudence," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994), the governing principles bear emphasis. The reasons for the presumption against retroactivity are manifest: At bottom, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 533 (1998) (plurality opinion) (internal quotation marks omitted). "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 265-66. The retroactive revision of laws thus destabilizes business and deters investment. See *Eastern Enters.*, 524 U.S. at 549 (Kennedy, J., concurring). More generally, the retroactive application of legislation can undermine "confidence in the constitutional system." *Ibid.*

B. The Ninth Circuit's Decision On What Constitutes The Relevant Event For Purposes Of Determining Retroactivity Conflicts With Decisions Of This Court

Against the foregoing backdrop, it is plain that the Ninth Circuit took too narrow a view of the pre-amendment conduct that must not be accorded retroactive legal significance. The Ninth Circuit focused solely on "the alleged presentation * * * of a false claim" after 1986 while disregarding the legal effect of the pre-1986 disclosures of the alleged fraud. Pet. App. at 12a-13a. In this the Ninth Circuit erred. Under *Hughes Aircraft* — and the "timeless and universal" presumption against retroactivity, *Landgraf*,

511 U.S. at 265 — the relevant conduct the consequences of which may not be affected retroactively is *both* the making of an allegedly false claim *and* the disclosure of fraud to the government. See, *e.g.*, *Wallace* v. *Reno*, 24 F. Supp. 2d 104, 115 (D. Mass. 1998), aff'd, 194 F.3d 279 (1st Cir. 1999). Thus, if in a *qui tam* action *either* the false claim *or* the disclosure occurred before the effective date of the 1986 amendment, the amendment does not apply, and the action is barred. A proper reading of the 1986 amendment and of *Hughes Aircraft* shows why.

The 1986 amendment established a new legal framework for the regulation of false claims. Prior to its adoption, a *qui tam* suit was barred once the government knew about allegedly fraudulent behavior — whether through the disclosure of a potential *qui tam* plaintiff or otherwise. The amendment changed the focus to public disclosure, rendering the government's knowledge irrelevant.

In *Hughes Aircraft* both the claims and the disclosure of the alleged fraud antedated 1986 (which is why the Court did not identify the "relevant conduct" for purposes of retroactivity, 520 U.S. at 946 n.4). But critical to the holding that the 1986 amendment could not be applied retroactively — and thus to the determination of what conduct was "relevant" — was the Court's analysis of the statute's effects. The amendment

> eliminates a defense to a *qui tam* suit — prior disclosure to the government — and therefore changes the substance of the existing cause of action for *qui tam* defendants by attach[ing] a new disability, in respect to transactions or considerations already past.

Id. at 947 (internal quotation marks omitted). Thus while it is undoubtedly true that making a false claim is *a* "relevant event" for retroactivity purposes — since applying the 1986 FCA to pre-1986 claims would impose new liabilities on past conduct — it is equally true that the disclosure to the government is a relevant event, since applying the 1986 FCA

to pre-1986 disclosure would save relators' causes of action that had previously been barred, thereby imposing new burdens on government contractors. Thus, under *Hughes Aircraft* and this Court's other retroactivity cases, if in a *qui tam* suit *either* allegedly false claims were made before the 1986 amendment took effect, *or* information concerning the claims was disclosed before the effective date, the application of the amendment would "attach new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270; see also *Martin* v. *Hadix*, 119 S. Ct. 2005, 2006 (1999).

Here, respondents based their action on the allegation that petitioner had made false claims both before and after the amendment's effective date. All agree that the pre-amendment claims cannot be the subject of a *qui tam* suit. The same ban on giving retroactive effect to the 1986 amendment also precludes *qui tam* pursuit of the later claims. The later claims did not arise from a new or different scheme, but were part of a course of alleged misconduct that supposedly continued past the change in the law. The government had information about the alleged fraud, even as to those claims formally submitted after the amendment's effective date.

Respondent Newsham's pre-enactment disclosures carried important legal consequences affecting the nature of petitioner's exposure to litigation.[3] Once those disclosures were made, no one but the government was empowered to decide whether the activities described in the disclosures warranted suit against the contractor. The Ninth Circuit's decision improperly changes the legal effect of the prior disclosures by allowing a relator to challenge alleged false claims submitted after 1986 despite the government's pre-

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[3] Respondent Bloem never disclosed anything to the government (see Pet. 22) and thus could not have been an "original source" regardless of whether he had any "direct and independent knowledge" of any alleged fraud.

1986 knowledge of the underlying conduct. This approach to *Hughes Aircraft* strips the case of much of its legitimate force.

Moreover, the Ninth Circuit's take on retroactivity rests on no discernible neutral principle. Here, the panel held that petitioner's submission of allegedly false claims, and not respondent Newsham's disclosures of the basis for the allegations, was the "relevant conduct" for retroactivity analysis. Pet. App. 11a-12a. Respondents were thus allowed to pursue their *qui tam* action under the amended FCA. But the panel's decision in this case is irreconcilable with a previous panel's decision in *United States ex rel. Anderson* v. *Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), cert. denied, 516 U.S. 1043 (1996). The *Anderson* panel held that disclosure to the government is the relevant event for retroactivity; the effect of this holding was to allow the relators there to pursue a claim that would otherwise have been barred. The panel here did not even mention the previous panel's decision in *Anderson*, much less follow its holding. In the Ninth Circuit, it seems, the "law" on retroactivity is little more than an pretext for holding that the government contractor always loses.

As this Court wrote in *Landgraf*, "unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." 511 U.S. at 283 n.35. Here, the unfairness to petitioner is plain. The government knew of allegations of fraud before the 1986 amendment. It had investigated, found no misconduct, and declined to proceed. Petitioner was able to order its business knowing that it would not be at legal risk if it submitted additional claims based on practices that the government had decided not to contest. If the Ninth Circuit's decision is to stand, however, petitioner would be subjected to newly minted jeopardy (and respondents given a corresponding windfall) that otherwise would have been barred. This is surely a text-book instance of the unfairness that the presumption against retroactivity is meant to avoid.

II. THE COURTS OF APPEALS ARE DIVIDED IN THEIR INTERPRETATION OF WHAT CONSTITUTES "PUBLIC DISCLOSURE" AND WHO IS AN "ORIGINAL SOURCE" UNDER THE 1986 FALSE CLAIMS ACT

The currently effective FCA, in relevant part, deprives courts of jurisdiction over *qui tam* actions that are

> [1] based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media *unless* * * * [2] the person bringing the action is the *original source* of the information.

31 U.S.C. § 3730(e)(4)(A) (emphases added). The statute defines an "original source" as someone "who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action." *Id.* § 3730(e)(4)(B). Even assuming that the Ninth Circuit correctly held that the post-1986 FCA, rather than the pre-1986 FCA, should apply to this case, the Ninth Circuit committed two fundamental errors in construing the amended statute. First, it incorrectly held that the disclosure of information in government audit reports or in civil discovery is not a "public disclosure" under the statute. Second, it erroneously expanded the concept of "original source" to embrace someone who conveys no information directly concerning the alleged fraud. The readings of "public disclosure" and "original source" are at odds with the constructions given the terms by other courts of appeals. The Court should resolve the conflicts by granting review and thus provide critical guidance to the government, to would-be *qui tam* plaintiffs, and to the courts on the scope of the amended FCA.

A. The Courts Of Appeals Are Divided On What Constitutes A "Public Disclosure"

As the petition explains (at 16-18), pivotal allegations of fraud on petitioner's part had been the subject of a government audit (see Pet. App. 12a), and other allegations were first revealed to respondents during discovery in this case (*id.* at 13a). The Ninth Circuit concluded that these events did not constitute "public disclosure" of the allegations of fraud, and some other courts of appeals have agreed with this narrow conception. Other courts of appeals, however, have read the term to embrace these kinds of disclosures.

The Second Circuit, for instance, has held that information is publicly disclosed when it is revealed to employees of the company accused of fraud on the government. See *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992). Rejecting the argument that "for the disclosure to be 'public,' the information must be potentially accessible to any member of the public," *ibid.*, the Second Circuit reasoned that the disclosure was "public" because the contractor's innocent employees were under no obligation to keep the information confidential, see *id.* at 323. The Second Circuit has likewise held that material produced in civil discovery is publicly disclosed if filed with a court. *United States ex rel. Kreindler & Kreindler* v. *United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993); accord *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 652-653 (D.C. Cir. 1994) (distinguishing between filed and unfiled discovery materials).

The Third Circuit has read the words "public disclosure" even more broadly, holding that the statute bars *qui tam* suits "based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator" — including information contained in discovery materials that were not filed with a court. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante P.A.* v. *Prudential Ins. Co.*, 944 F.2d 1149,

1155-56 (3d Cir. 1991). The Sixth Circuit shares the Third Circuit's interpretation of the statute: information is publicly disclosed so long as it is "available to anyone who request[s] it." *United States ex rel. Branahn* v. *Mercy Health Sys. of S.W. Ohio*, 188 F.3d 510, 1999 WL 618018 (6th Cir. 1999).

The Tenth Circuit has disagreed, finding "public disclosure" only where the government makes an affirmative act of disclosure, though the disclosure can be to a single person. *United States ex rel. Ramseyer* v. *Century Healthcare Corp.*, 90 F.3d 1514, 1520-21 (10th Cir. 1996). The Seventh Circuit, finally, has held that information is publicly disclosed only if a disclosure is made either to the "public at large" or to a public official, as opposed to a single "private person." *United States* v. *Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999); see also *United States ex rel. Mistick PBT* v. *Housing Auth. of City of Pittsburgh*, 186 F.3d 376, 391 (3d Cir. 1999) (Becker, C.J., dissenting), petition for cert. filed, 68 U.S.L.W. 3891 (U.S. Dec. 8, 1999) (No. 99-969).

The cramped readings of the words "public disclosure" by the Ninth Circuit and likeminded courts are in error. As the text of the FCA itself suggests, the term "public disclosure" cannot be limited to disclosure to the world at large; the statute refers not only to disclosures through "the media," for instance, but also to disclosure in a "Government Accounting Office audit," which is not the type of disclosure likely to be disseminated widely, if at all. See, *e.g.*, *John Doe Corp.*, 960 F.2d at 323 (noting that, if Congress had thought that disclosure to a contractor's innocent employees was nonetheless not "public," "we would expect a narrower exception to jurisdiction" based on disclosure to the media and widely accessible government documents).

The legislative history confirms that Congress did not intend "public disclosure" to mean only disclosure to the

public at large.[4] The broader understanding of "public disclosure" as a disclosure to anyone not in the government is also more consistent with the purposes of the FCA. Were disclosure to employees of a government contractor not considered disclosure to the "public," as the Ninth Circuit ruled, the employees would have the opportunity to sue based on information obtained from the government — precisely the type of "parasitic" *qui tam* action that Congress was attempting to prevent.

B. The Courts Of Appeals Are Divided On Who Qualifies As An "Original Source"

The Ninth Circuit interpreted the phrase "original source" so broadly that a relator can be deemed an original source of information even if he or she provided no direct and independent information concerning the incidents that actually constitute the factual basis for a *qui tam* complaint. This reading of the FCA is both implausible and in conflict with the readings of other circuits.

The FCA defines an "original source" as "an individual who has *direct and independent knowledge of the information on which the allegations are based* and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B) (emphasis added). Under the natural reading of this statutory language, someone seeking to qualify as an "original source" must have done more than provide information that merely *leads to* the discovery of information that forms the basis of a complaint, or provide information about a supposed *pattern* of conduct that might form the basis of the complaint. Rather, an original source

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[4] See Salcido, *Screening Out Unworthy Whistleblower Actions*, 24 PUB. CONT. L.J. 237, 250-62 (1995); Vogel, *The Public Disclosure Bar Against* Qui Tam *Suits*, 24 PUB. CONT. L.J. 477, 481-91 (1995).

must provide information regarding the very conduct that allegedly violates the FCA.

The Ninth Circuit, however, read this statutory provision far more broadly. As the petition explains (at 21-23), respondent Newsham, the only possible "original source," had been terminated in 1984 and thus could not have had any "direct and independent knowledge" of any supposed fraud by petitioner that occurred after her termination. Since the only claims remaining in the case concern the period after Newsham's termination, she could have been an original source only under one of two possible explanations: either because she provided information to the government in 1984 that prompted investigations leading to the uncovering of the alleged post-1986 fraud; or because she provided information regarding a pattern of pre-1986 conduct, which pattern continued after 1986. Either way, respondent Newsham was held to be an original source even though she gave the government no information regarding any specific instances of fraud that she now alleges took place after 1986.

The Ninth Circuit's decision not only rests on an implausible reading of the statute, it also fosters precisely the kind of parasitic *qui tam* suit that Congress meant to foreclose. As the Ninth Circuit itself acknowledged, "[t]he relators asserted that they did not learn of the basis for some of these [post-1986] claims until they conducted discovery" after filing their complaint in 1988. Pet. App. 13a. Given the Ninth Circuit's expansive definition of "original source," anyone who passed on rumors that triggered a government investigation would then be able to use discovery of in connection with that investigation as the basis for a *qui tam* suit. Thus the Ninth Circuit's holding throws open the door to "parasitic plaintiffs who offer only secondhand information, speculation, background information or collateral research." *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999).

The Ninth Circuit's holding also conflicts with the holdings of other circuits. As the Tenth Circuit has held, "To establish original source status knowledge [sic], a *qui tam* plaintiff must allege specific facts * * * showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with competent proof. * * * Direct and independent knowledge is knowledge marked by the absence of an intervening agency and unmediated by anything but the relator's own labor." *Hafter*, 190 F.3d at 1162; see also *Mistick PBT*, 186 F.3d at 389 ("a relator cannot be said to have 'direct and independent knowledge of the information on which [its fraud] allegations are based,' if the relator has no direct and independent knowledge of the allegedly fraudulent statements" (citation omitted)); *Bank of Farmington*, 166 F.3d at 864 (holding that a party is not an original source when "knowledge of a piece of information essential to her claim" was derived entirely from or depended upon testimony in another case). This Court should grant review to resolve the conflict among the circuits.

III. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION THAT STATE-LAW "SPECIAL MOTIONS TO STRIKE" MAY BE MADE IN FEDERAL COURTS

The Ninth Circuit held that respondents could move to dismiss petitioner's counterclaims for breach of fiduciary duties and other torts. According to the panel, this motion could be predicated not on the Federal Rules of Civil Procedure but on a "special motion to strike" under the so-called "anti-SLAPP" provisions of the California Civil Procedure Code. This holding — that respondents could block the assertion of claims within the jurisdiction of the federal courts by making use of a special state procedural rule that has no federal counterpart — presents an important question of federal procedure that warrants this Court's consideration.

A "SLAPP" suit (for Strategic Lawsuit Against Public Participation), as defined by the California "anti-SLAPP statute," is "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." CAL. CIV. PROC. CODE § 425.16(a); see *Wilcox* v. *Superior Ct.*, 27 Cal. App. 4th 809, 816 (1994). In order to deter SLAPP suits, California provides defendants in such cases with a procedural remedy: a "special motion to strike."[5] The movant must make a *prima facie* showing that "the plaintiff's cause of action arises from the defendant's free speech or petition activity." *Church of Scientology of Cal.* v. *Wollersheim*, 42 Cal. App. 4th 628, 646 (1996). The burden then shifts to the plaintiff to show "that there is a probability that [he] will prevail on the claim[s]." CAL. CIV. PROC. CODE § 425.16(b)(1); see *Wilcox*, 27 Cal. App. 4th at 820.

In ruling on the motion, a court "consider[s] the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." CAL. CIV. PROC. CODE § 425.16(b)(2). The special motion to strike may be brought within 60 days (or later, with permission), *id.* § 425.16(f); discovery is stayed while the motion is pending (unless a plaintiff can show good cause), *id.* § 425.16(g); a defendant whose special dismissal motion fails can take an immediate interlocutory appeal, *id.* § 425.16(j); and a prevailing defendant is entitled to fees and costs, *id.* § 425.16(c).

Critically for present purposes, as California courts have stressed, the motion to strike is "a mere rule of procedure." *Ludwig* v. *Superior Ct.*, 37 Cal. App. 4th 8, 21 (1995); see also *Robertson* v. *Rodriguez*, 36 Cal. App. 4th 347, 356

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[5] The statute applies both to original actions and to counterclaims. Although this case happens to involve counterclaims, we refer to the parties bringing the anti-SLAPP motion to strike (respondents Newsham and Overbeek) as "defendant" and the party seeking to continue to maintain the action (petitioner Lockheed) as "plaintiff."

(1995) ("Section 425.16 does not change the legal effect of past conduct. It merely is a procedural screening mechanism.").

On its face, the California anti-SLAPP statute raises substantial due process concerns by restricting a plaintiff's opportunity to make a meaningful factual showing and impinges on traditional jury-trial rights allowing the court to dispose of a case on grounds that ordinarily would not warrant dismissal without trial. See *Opinion of the Justices (SLAPP Suit Procedure)*, 138 N.H. 445, 449-51, 641 A.2d 1012, 1014-15 (1994) (holding that a bill modeled on the California statute would be facially unconstitutional). But while the California courts have interpreted the statute to avoid these constitutional difficulties, application of the anti-SLAPP statute in federal court cannot be squared with the Rules Enabling Act.

A. The California Anti-SLAPP Statute Is Displaced By Federal Law

California's anti-SLAPP statute has features that are in conflict with at least four federal rules, Fed. R. Civ. P. 11, 12 and 56, and Fed. R. App. P. 5, and with 28 U.S.C. §§ 1291 and 1292. Because Rules 12 and 56 occupy the field of procedures designed to dispose of claims without trial, Rule 11 the field of sanctions for lawsuits whose purpose is to harass or cause unnecessary delay, and Appellate Rule 5 and Sections 1291 and 1292 the field of interlocutory appeals, the special motion to strike cannot be applied in federal court.

The federal rules of civil and appellate procedure are presumptively valid as both within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and as within Congress's power under the Constitution. See *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 6 (1987). Thus, in deciding whether to supplement the federal rules with a state-created procedural rule, a federal court must determine "whether the scope of the Federal Rule in fact is sufficiently broad to control the

issue before the Court." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980). If the federal rule is "sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court," then it will "leav[e] no room for the operation of that [state] law." *Woods*, 480 U.S. at 4-5 (internal quotation marks omitted). The inquiry into a rule's scope has two steps. First, a court determines whether the purposes underlying a federal rule and a possibly conflicting state rule are "sufficiently coextensive" to indicate that the former occupies the same field as the latter. *Woods*, 480 U.S. at 7. Second, a court determines whether the federal and state rules may both be applied in the same case, or whether the application of one precludes the meaningful application of the other. See 19 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4510, at 24 (2d ed. 1996 & supp. 1999) (asking "whether the federal rule and the state rule can be applied contemporaneously").

Here, the Ninth Circuit erred in holding that both the federal rules and the anti-SLAPP statute "can exist side by side * * * each controlling its own intended sphere of coverage without conflict." Pet. App. 19a (citing *Walker*, 446 U.S. at 752). Indeed, it could not be more plain that the statute as a whole cannot be applied in federal courts. It is beyond dispute, for instance, that federal courts of appeals would not be required to entertain interlocutory appeals every time a federal district court denies a special motion to strike. *See* 28 U.S.C. §§ 1291, 1292; FED. R. APP. P. 5; *see also Rogers* v. *Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 980-82 (C.D. Cal. 1999) (holding that subsections 425.16(f) and (g) do not apply in federal court because the limits they place on discovery collide with the liberal discovery allowed under Rule 56). The Ninth Circuit did limit its decision to upholding the use of subsections 425.16 (b) and (c), allowing the special motion to strike and awarding fees and costs to a prevailing defendant. Pet. App. 18a-

19a. But even those sections of the anti-SLAPP statute cannot be applied in federal court.

As the Ninth Circuit itself acknowledged, the anti-SLAPP statute and the federal rules both serve the purpose of "expeditious[ly] weeding out * * * meritless claims before trial." Pet. App. 19a. Both are also aimed at protecting defendants from the financial hardship of defending against meritless claims brought only to harass. It is true, as the panel wrote, that the anti-SLAPP statute "is crafted to * * * protect[] * * * 'the constitutional rights of freedom of speech and petition for redress of grievances.'" *Ibid.* But it is not true that this is "an interest not directly addressed by the Federal Rules" (*ibid.*). Disposing of meritless attacks on constitutional freedoms is, rather, precisely one of the purposes served by the "weeding out" mechanisms embodied in Rules 12 and 56.

Not only do Rules 11, 12 and 56, on the one hand, and the anti-SLAPP statute, on the other, share the same purposes, but they also cannot both be applied in the same case without meaningless and burdensome redundancy, and explicit conflict.

To begin with, the standard for opposing a special motion to strike is essentially the same as that for opposing a motion for summary judgment. If a defendant has met his burden of showing that he was engaged in protected activity, "the plaintiff must demonstrate the complaint is * * * supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilcox*, 27 Cal. App. 4th at 823 (internal citations omitted). This *prima facie* showing is essentially the same as the standard in a summary judgment motion, where a party opposing such a motion "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Thus the California courts have emphasized that the test for a special motion to strike "is similar to the standard applied to evidentiary showings in

summary judgment motions." *Wollersheim*, 42 Cal. App. 4th at 654. Indeed, even the nature of the evidence is the same, "competent admissible evidence within the personal knowledge of the declarant." *Id.* Given the essential similarity of the standard for successfully opposing a special motion to strike and a motion for summary judgment, there is no reason to think that a defendant who failed on the former could prevail on the latter. The plaintiff would have already shown that there is a genuine issue as to a material fact. Allowing a defendant who lost his or her special motion to strike to move for summary judgment would be to give him or her a second bite at the apple, which would be wasteful, burdensome, and unfair. Thus the Ninth Circuit's claim that a party who fails to win a special motion to strike "remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment," Pet. App. 19a, is mistaken. (It should go without saying that it would be pointless to make a Rule 12 motion to dismiss after losing on a special motion to strike.)

Moreover, when it comes to fees and costs the rules explicitly conflict. Rule 11 governs in federal court the awarding of sanctions against plaintiffs who sue for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11(b)(1). These are precisely the concerns that the anti-SLAPP statute was designed to address. See *Wilcox*, 27 Cal. App. 4th at 815-16. But Rule 11 merely allows a judge to award a defendant "some or all of the reasonable attorneys' fees and other expenses," and only if the defendant made a Rule 11 motion and such an award is "warranted for effective deterrence." This discretionary award squarely conflicts with the automatic award of fees and costs to a defendant who prevails in a special motion to strike.

This is exactly the kind of conflict that this Court has already held precludes the use of state procedures in federal courts. In *Burlington Northern R.R.* v. *Woods*, the Court held that Federal Rule of Appellate Procedure 38 displaced

an Alabama statute that imposed a 10% penalty on any appellant who had obtained a stay of a judgment later affirmed without substantial modification. Rule 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it *may* * * * award just damages and single or double costs to the appellee" (emphasis added). The Court held that the discretionary aspect of Rule 38 "unmistakably conflict[ed] with the mandatory provision of Alabama's affirmance penalty statute." 480 U.S. at 7.

Other cases in which this Court has held that state procedural rules were not preempted by federal rules are easily distinguished. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), involved a New Jersey statute governing shareholder derivative actions that made an unsuccessful plaintiff liable for attorney's fees and required the posting of a bond as a condition of prosecuting the action. 337 U.S. at 543. Rule 23(b), by contrast, required "the stockholder's complaint to be verified by oath and to show that the plaintiff was a stockholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law." *Id.* at 556. The Court decided that there was no conflict between Rule 23 and the New Jersey statute. The federal rule was not concerned with liabilities but with standing and disclosure and notice to the court and the parties. *Id.* at 556. Thus, the purposes of the rules at issue in *Cohen* were different, unlike the rules at issue here and in *Woods*, which is why the state rule in *Cohen* survived. *Walker* v. *Armco Steel Corp.* is similarly distinguishable. That case involved an Oklahoma statute of limitations that deemed an action commenced only when a defendant was served; Rule 3, in contrast, provides that an action is commenced on the filing of a complaint. Rejecting the argument that the federal rule ousted the state statute, this Court held that the rule and the statute served different purposes. See 446 U.S. at 750-52 (noting that "[t]here is no indication that the Rule was intended to toll a state statue of limitations, much less that it purported to displace state

tolling rules for purposes of state statutes of limitations," while the Oklahoma statute promoted the important goals of fairness and allowing the defendant to have peace of mind after the established deadline).

In sum, even the rump portion of California's anti-SLAPP statute endorsed by the Ninth Circuit is incompatible with Rules 11, 12, and 56. Their purposes are essentially identical, while their effects conflict. When it comes to California's anti-SLAPP statute in federal court, therefore, there is "no room for the operation of that law." *Woods*, 480 U.S. at 5.

B. The Question Of The Applicability Of State Anti-SLAPP Statutes In Federal Court Is Worthy Now Of The Court's Review

Although among the courts of appeals only the Ninth Circuit has addressed itself to the question of whether anti-SLAPP statutes may be applied in federal court, the question is worthy of this Court's review. To begin with, the Ninth Circuit's decision was clearly wrong. Moreover, eleven states have enacted anti-SLAPP statutes similar to California's, and bills have been introduced in nine others.[6] The question will therefore arise with increasing frequency. Indeed, one district court has already decided, contrary to the Ninth Circuit, that state anti-SLAPP procedures do not apply

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[6] Del. Code. tit. 10, §§ 8136–8138; Ga. Code § 9-11-11.1; Me. Rev. Stat. tit. 14, § 556; Mass. Gen. Laws ch. 231, § 59H; Minn. Stat. §§ 554.01–554.045; Neb. Rev. Stat. §§ 25-21,241 to 25-21,246; Nev. Rev. Stat. §§ 41.635–41.670; N.Y. Civ. Prac. L. & R. §§ 3211(g), 3212(h); N.Y. Civ. Rights L. § 70-a; R.I. Gen. Laws §§ 9-33-1 to 9-33-4; Tenn. Code §§ 4-21-1001 to 4-21-1004; Wash. Rev. Code §§ 4.24.510, 4.24.520. See generally Braun, *Increasing Slapp Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 1036-44 (1999) (discussing anti-SLAPP statutes outside California, and noting that as of 1999, anti-SLAPP laws had been introduced into the legislatures in nine states other than the ones listed above.)

in federal court. *Baker* v. *Coxe*, 940 F. Supp. 409, 416-17 (D. Mass. 1996); see also *Pepsi-Cola Co.* v. *Rhode Island Carpenters Dist. Council*, 962 F. Supp. 266, 283-84 (D.R.I. 1997) (holding the Rhode Island anti-SLAPP statute pre-empted by the National Labor Relations Act); *AirTran Airlines, Inc.* v. *Plain Dealer Publ'g Co.*, 66 F. Supp. 2d 1355, 1368-70 (N.D. Ga. 1999) (assuming that the Georgia anti-SLAPP statute applied but rejecting the motion to strike).

There are, finally, substantial federal interests at stake here. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). It may be that the "special motion to strike" is a feature worth having in the federal system. That, however, is a decision not for lower federal courts that happen to sit in states with anti-SLAPP statutes, but for the Advisory Committee on Rules of Civil Procedure and for this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 99-1060

IN THE

Supreme Court of the United States

LOCKHEED MISSILES AND SPACE COMPANY, INC.

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. MARGARET A. NEWSHAM AND MARTIN OVERBEEK BLOEM,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondents Newsham and Bloem contend that neither the False Claims Act (FCA) issues nor the anti-SLAPP issues raised in the Petition warrant review. They are wrong.

I. THE RETROACTIVITY ISSUE WARRANTS REVIEW.

Respondents argue that the "factual setting in which Petitioner here urges the existence of a conflict is itself unique, non-recurring, and increasingly unimportant with the passage of time." Opp. at 3. Yet, the retroactivity issue arose in a similar factual setting in at least two other cases addressed by the circuit courts in recent years. *See United States ex rel. Lujan v. Hughes Aircraft Company*, 162 F.3d 1027 (9th Cir. 1998) and *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3rd Cir. 1999).

Moreover, while the temporal reach of the 1986 FCA, 31 U.S.C. §§ 3729-3733 (1986), will, admittedly, become less significant with the passage of time, the question of whether a new federal statute should be applied in a pending case is a recurring one.[1] Just last year, this Court resolved an inter-circuit conflict that postdated both *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), regarding whether a new attorneys' fees statute applied to pending cases. *See Martin v. Hadix*, 119 S. Ct. 1998, 2003 (1999). Thus, notwithstanding the retroactivity principles set forth in *Landgraf* and *Schumer*, the lower courts continue to struggle with the issue of retroactivity. Consequently, further guidance by this Court will provide needed assistance

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[1] Despite the 1986 FCA's 10 year statute-of-limitations, it is possible that the retroactivity issue will resurface in a *qui tam* action filed in the future. For example, if a would-be relator filed a *qui tam* action alleging that a contractor was mischarging the Government in the year 2000 and it turned out that the Government knew of the charging practices at issue since at least 1985, the statute-of-limitations would not bar the action, but the principles against retroactivity would.

to the lower courts, particularly with respect to determining which of two or more competing events are to be treated as the "relevant events" for assessing retroactivity.[2]

The Ninth Circuit's decision in *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995) (*Anderson I*), *cert. denied*, 516 U.S. 1043 (1996) is in direct conflict with the decision below and with the Third Circuit's decision in *Cantekin* on the precise issue that was explicitly left unresolved in *Schumer*: "which of [ ] two events constitutes the relevant conduct for purposes of [the] retroactivity analysis." *Schumer*, 520 U.S. at 946 n.4. Nevertheless, respondents assert that there is no conflict because the *Anderson I* decision was "vitiated by *Schumer* and is no longer followed by the Ninth Circuit." Opp. at 4.

Respondents are wrong on both counts. First, although *Anderson I* predates *Schumer*, it is based on the same retroactivity principles that this Court applied in *Schumer*.[3] *Anderson I* applied the *Landgraf* analysis in determining that disclosure to the Government is a relevant event for purposes of retroactivity. *Anderson I*, 52 F.3d at 812-815. Nothing in *Schumer* undermines that conclusion. In fact, for the reasons

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[2] The different results reached by the concurring and dissenting opinions in *Martin* highlight the importance of choosing the correct reference point for determining retroactivity. *Compare Martin*, 119 S. Ct. at 2008-2009 (Scalia, J., concurring) (stating that the doing of legal work for which attorneys' fees are to be paid is the relevant retroactivity event and concluding that work performed after effective date of new attorneys' fee statute should be reimbursed pursuant to new statute) *with Martin*, 119 S. Ct. at 2011-2012 (Ginsburg, J., concurring in part and dissenting in part) (stating that the attorney's undertaking to represent client is the relevant retroactivity event and concluding that work performed after effective date of new attorneys' fee statute should be reimbursed pursuant to earlier attorneys' fees statute that was in effect at time representation was undertaken).

[3] Respondents themselves recognize that *Schumer* did not change the law; rather, it merely applied the general retroactivity principles set forth in *Landgraf* to the jurisdictional provision in the 1986 FCA. Opp. at 3-4.

explained in the Petition, at 12, and in the Brief of *Amicus Curiae* Chamber of Commerce, at 3-5, *Schumer* supports it. That fact is underscored by *Anderson II*, wherein the Ninth Circuit reaffirmed its holding in *Anderson I* after *Schumer* was decided. *United States ex rel. Anderson v. Northern Telecom, Inc.*, No. 96-36152, 1998 WL 141179, at *3 (9th Cir. March 27, 1998) (*Anderson II*) (unpublished opinion).[4] Second, the Ninth Circuit has not overruled *Anderson I*. Neither *Lujan* nor the decision below is an *en banc* decision. Thus, the intra-circuit conflict is genuine.

The mere fact that the Third Circuit declined to follow the Ninth Circuit's decision in *Anderson I* does not eliminate that conflict as respondents suggest. Instead, it affirms that there is a conflict and shows that there is a need for further guidance in this area of the law.

Furthermore, if the Court grants *certiorari* on the "public disclosure" and "original source" issues, it should first decide whether the 1986 FCA applies to this case. Thus, the retroactivity issue not only merits review in its own right, but also merits review in connection with the statutory issues discussed below.[5]

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[4] Contrary to respondents' assertion, Opp. at 9 n.8, the fact that *Anderson II* was not published is of no moment here.

[5] There are more factors weighing in favor of review here than an intra-circuit conflict. Therefore, to the extent that *Davis v. United States*, 417 U.S. 333, 340 (1974), suggests that an intra-circuit conflict is in itself an improper basis on which to grant review, it is inapposite. *See, e.g., John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (granting *certiorari* because of an intra-circuit conflict *and* the importance of the question at issue). Moreover, *Davis* states only a general, not an absolute, rule. *Cf. Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (granting *certiorari* to resolve intra-circuit conflict).

II. THE "PUBLIC DISCLOSURE" AND "ORIGINAL SOURCE" ISSUES WARRANT REVIEW.

Lockheed's Petition presents the opportunity to resolve the most heavily disputed legal question arising under the 1986 FCA Amendments – who is a proper *qui tam* relator. Respondents downplay the significance of the Ninth Circuit's finding upholding jurisdiction over their post-1986 claims. They assert that Lockheed presents merely its disagreement with *factual* determinations rendered by the courts below and does not present any broadly applicable question of law, let alone a split of authority.

To the contrary, the Petition presents the same jurisdictional question upon which this Court granted *certiorari* but ultimately did not reach in *Schumer*: Is the Government's disclosure of an audit report to the audited company a "public" disclosure? The Petition also presents the questions of whether *qui tam* relators can base allegations in an amended complaint on Government audit reports obtained during discovery and whether they can be deemed to be "original sources" of such information. The Court's interpretation and resolution of the circuit split on these questions is of equal if not greater importance today than it was when the Court granted *certiorari* in *Schumer*.

Respondents' characterization of these issues as presenting only a factual dispute is disingenuous. First, they assert that the "public disclosure" issue "was not squarely decided by the court below," as if to suggest that the issue is not ripe for this Court's determination. Opp. at 10. On the contrary, the Ninth Circuit upheld jurisdiction as a matter of law under the amended FCA, and its determination is properly subject to review, particularly in light of the conflict the decision presents.

In finding that there was no evidence of a public disclosure, the Ninth Circuit ignored the fact that the Government had disclosed its audit report to Lockheed prior to the filing of this action. Pet. at 19, n.15. The court also ignored respondents' admissions that they obtained some of their information about their post-1986 claims – the claims

that form the basis of their amended complaint - from the Government's audit reports which were disclosed to them during the course of discovery. Pet. at 17. Respondents' opposition does not dispute that these disclosures occurred, or that their amended complaint is based at least in part on such disclosures.

The court's failure to account for these disclosures is tantamount to holding that neither event constituted a public disclosure – a holding squarely at odds with the decisions of other circuits cited in the Petition.[6] Respondents attempt to distinguish those cases as presenting "different facts and different issues" from the "private communication of a non-public audit report" which occurred here. Opp. at 11. Respondents' conclusory assertions fail to draw any meaningful distinction. They assert that the relators in *Stinson* and *Kreindler* were barred because they were "lawyers who learned about the alleged frauds only through their representation of clients." Opp. at 11.[7] Actually the relators in those cases were barred simply because the disclosure of information to them during discovery in a civil case was held to be a public disclosure.

Respondents further argue that the Government's earlier disclosure of its audit report to Lockheed was insufficient to constitute a "public disclosure" because, unlike *Doe*, the Government's disclosure was not made throughout the company. However, *Doe*, which involved the Government's disclosure of possible wrongdoing to company employees, held that such a disclosure need not be "widespread." 960

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[6] *United States ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir), *cert. denied*, 508 U.S. 973 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992); *United States ex rel. Stinson et al. v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991).

[7] This represents another classic "distinction without a difference." Ironically, it was respondents' counsel, not respondents, who obtained the products of discovery in this case.

F.2d at 323. Indeed, other courts have further clarified that a public disclosure can occur even when the disclosure is limited to one person. *See United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1005 (10th Cir. 1996) (a public disclosure occurs whenever the requisite disclosure is made "to any member of the public not previously informed thereof"); *United States ex rel. Mistick PBT v. Pittsburgh Housing Authority*, 186 F.3d 376, 383 (3rd Cir. 1999) (information obtained under the Freedom of Information Act is a public disclosure once it is received by the individual requester), *pet'n for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 8, 1999) (No. 99-969).

The Ninth Circuit's decision on public disclosure in this case is devoid of any analysis, and the precise basis for its decision is confusing, as noted in the Petition.[8] This ambiguity, however, does not immunize the decision from review, particularly where the legal conclusion is at odds with the holdings of other circuits.

With regard to whether respondents qualify as original sources of the publicly disclosed information, respondents suggest that an original source is any "whistleblowing insider." Opp. at 12. While cases have used that term to describe typical *qui tam* relators, the statutory definition of an "original source" requires much more, as set forth in the cases cited in the Petition at 21-23. Lockheed asserted that respondents could not possibly have supplied information to the Government in 1984 about conduct that allegedly

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[8] The Ninth Circuit's confusion on the public disclosure issue is in part a result of its failure to adhere to the structure of the statute. The court correctly noted that the statute requires determination of whether there has been a public disclosure *before* deciding whether the relator is an original source of the publicly disclosed information. App. at 14a. *See also Burns ex rel. United States v. A.D. Roe Co.*, 186 F.3d 717, 722 (6th Cir. 1999). However, by deciding that the respondents are original sources without regard to whether there has been a public disclosure, the court put the cart before the horse.

occurred after 1986, particularly because Newsham's employment was terminated in 1984. Further, respondents admitted that they did not learn of the basis for some their post-1986 claims until after 1988 when they obtained Government audit reports in discovery.

Respondents offer only the conclusory assertion that their knowledge of *some* of the relevant facts did not originate in the governmental documents. However, their admission that they did not disclose (because they did not know) how or whether the alleged idle and nonproductive time was charged (Opp. at 2) belies that assertion. Further, their argument that they can maintain their post-1986 claims simply because they possessed *some* of the information on which those claims are based ignores the decisions of other circuits described in the Petition, at 21-23, which require that relators "directly observe" the events rather than present secondhand, derivative information.

Finally, respondents state that both courts below rendered factual findings that the Government audit reports concerning post-1986 conduct resulted from respondents' disclosures of their "direct and independent knowledge." Opp. at 12. In fact, the issue of whether respondents were original sources was never presented to the district court; therefore, that court never rendered any findings pertaining to whether respondents qualified as original sources under the amended jurisdictional provision. And, while the Ninth Circuit erroneously concluded that "it is undisputed that the relators directly observed the non-productive labor and improper billing that form the heart of their allegations" (App. at 14a), the Ninth Circuit never gave Lockheed an opportunity to dispute respondents' alleged "direct knowledge" of their post-1986 claims.[9]

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[9] As noted in the Petition, the Ninth Circuit should have remanded the questions concerning public disclosure/original source to the district court, which never had the opportunity to render any factual

(Footnote cont'd on next page)

III. THE ANTI-SLAPP ISSUE WARRANTS REVIEW.

Respondents contend that the question of whether a state's procedures for a special motion to strike apply in federal court "is a unique one that has never arisen before and is likely to remain rare." Opp. at 4-5. Respondents' position disregards the growing number of state anti-SLAPP statutes that provide for a special motion to strike and the resulting growing number of special motions to strike that are now brought in federal courts.[10] Although petitioner is not aware of any circuit court decisions that address this issue, special motions to strike have, contrary to respondents' suggestion, been heard in more than one federal district court. Some of these decisions squarely conflict with the Ninth Circuit's decision here. *See e.g.*, *Baker v. Coxe*, 940 F. Supp. 409, 417 (D. Mass. 1996) (denying special motion to strike, finding that to the extent that the special motion to strike procedures impose additional procedures, they do not trump Fed. R. Civ. P. 12(b)(6)); *see also*, *Pepsi-Cola Co. v. Rhode Island Carpenters Dist. Council*, 962 F. Supp. 266, 284 (D. R.I. 1997) (dismissing Anti-SLAPP counterclaim as preempted by the National Labor Relations Act).

Even within California, application of the state special motion-to-strike procedures in federal court is not unique. At least four district courts in California have applied the Ninth Circuit's decision in addressing special motions to strike. *See Metabolife International, Inc. v. Wornick*, 72 F.

(Footnote cont'd from previous page.)

determination on these issues. Respondents do not dispute Lockheed's contention that remand on these issues would have been the appropriate course. Because the Ninth Circuit, instead, issued a published decision conflicting with other circuit-court decisions on these issues, review by this Court is warranted.

[10] As addressed in the Brief of *Amicus Curiae*, eleven states have enacted anti-SLAPP statutes similar to California's and nine additional states are considering enacting such legislation. *Amicus* Brief at 19. Thus, this issue is not confined to California or to the Ninth Circuit.

Supp. 2d 1160, 1165-1166 (S.D. Cal. 1999) (granting special motion to strike based on legal defenses and specifically declining to weigh evidence to determine if plaintiff established a prima facie case because the court had stayed all discovery pursuant to the statute); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1111 (N.D. Cal. 1999) (denying plaintiff's request for additional discovery to support allegations and granting special motion to strike); *Rogers v. Home Shopping Network*, 57 F. Supp. 2d 973, 980-82, 985 (C.D. Cal. 1999) (finding the expedited procedures used to test the plaintiff's evidence before conducting discovery would collide with Fed. R. Civ. P. 56 and continuing the hearing on the special motion to strike until discovery is complete); and *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal 1999) (concluding that the special motion to strike procedures do not apply to federal question claims that are asserted in the same action as state law claims).

Respondents also contend that this issue is not ripe for review because the district court has not yet entered, and the Ninth Circuit has not yet reviewed, a final order on respondents' anti-SLAPP motion. Opp. at 14. Yet, this Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals pursuant to 28 U.S.C. §1254(1) (1993). Review is warranted here because several special motions to strike brought in federal district courts have already been impacted by the Ninth Circuit's decision. Additionally, application of a state's special motion to strike procedures in federal court implicates the broader question of law about when state procedural rules apply in federal court. In that regard, the Ninth Circuit's decision conflicts with the Supreme Court's decisions in *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-750 (1980), and *Burlington N. R.R. v. Woods*, 480 U.S. 1, 6 (1987). See Petition at 24-28. In sum, the circumstances under which a state procedural rule can be applied in federal court is an important question of federal procedure that merits this Court's deliberation.

IV. AT A MINIMUM, THIS COURT SHOULD HOLD THIS PETITION PENDING ITS DECISION IN *STEVENS* REGARDING THE CONSTITUTIONALITY OF THE FCA'S *QUI TAM* PROVISIONS.

While respondents recognize that this Court's decision in *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, No. 98-1828, 1999 WL 1045146 (Nov. 19, 1999) could be dispositive here, they urge the Court to send this case back to the district court immediately. Opp. at 17. Balancing respondents' desire to avoid a relatively modest delay to litigate a case that may soon be deemed unconstitutional against petitioner's interest in preventing great (and possibly avoidable) expenses and the district court's interest in preserving scarce judicial resources, however, weighs in favor of holding this petition pending a decision in *Stevens*.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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